UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1944.

No. 4111.

L. METCALFE WALLING,

Administrator of the Wage and Hour Division,
U. S. Department of Labor,

PLAINTIFF, APPELLANT,

v.

PORTLAND TERMINAL COMPANY,

DEFENDANT, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MAINE,
FROM JUDGMENT (PETERS, J.), JUNE 20, 1945.

TRANSCRIPT OF RECORD.

WILLIAM S. TYSON, ACTING SOLICITOR,
JETER S. RAY, ASSISTANT SOLICITOR,
GEORGE H. FOLEY, REGIONAL ATTORNEY,
GEORGE W. JANSEN, SUPERVISING ATTORNEY,
HARRY A. TUELL, SENIOR ATTORNEY,
for Appellant.

E. SPENCER MILLER,
for Appellee.

TABLE OF CONTENTS.

	Page
Court (Circuit Court of Appeals) and Title of Case	1
TRANSCRIPT OF RECORD OF DISTRICT COURT:	
Title of Case in District Court, Maine	1
Complaint	1
Exhibit A,—Wage Orders	6
Amended Answer	15
Transcript of Testimony	18
Testimony of Morton A. Thomas	20
Joseph M. Libby	46
Keith R. Carle	55
William J. Coyne, Jr.	59
Charles E. Morgan	63
Herman F. Berrick	66
Maurice L. Carter	68
Herbert E. Pickering	74
Joseph W. Widor	77
Howard L. Clark	79
Robert S. Haney	82
William A. O'Neil	86
Leon I. Burbank	91
Norman W. Pettis	95
Patrick J. Tracey	98
James L. Quincy	101
Harris L. Stroat	102
John F. Johnson	104
Perley N. Dykeman	108
Plaintiff's Exhibits:	
No. 3,—Portland Terminal Co. Trainmen's Examination, Form 1	114
4,—Same, Form 2	115
5,—Same, Form 3, to J. L. Quincy	116

Page

Plaintiff's Exhibits:
No. 6,—Main Central Railroad Co. Report of Reviewing Board (Leo E. Cyr) 117
7,—Agreement, Oct. 1, 1943, Maine Central Railroad Co. and Portland Terminal Co. with Brotherhood of Railroad Trainmen 118
8,—List of Yard Brakemen of Portland Terminal Co., Jan. 1, 1942, to March 20, 1945, not now in service 119
9,—Same, now in service 121
10,—List of Yard Brakemen Applicants who did not accept employment 122
Opinion of the District Court 123
Judgment 126
Notice of Appeal 127
Statement of Points 128
Designation of Record 129
Stipulation 131
Motion as to Original Exhibits 132
Order as to Original Exhibits 123
Certificate of Clerk of District Court 134

Proceedings in United States Circuit Court of Appeals, First Circuit 135
Minute entry of hearing 135
Opinion, Mahoney, J 135
Dissenting opinion, Magruder, J 141
Judgment 142
Note reissuance of mandate 142
Clerk's certificate 142
Order allowing of certiorari 144

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OCTOBER TERM, 1944.

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L. METCALFE WALLING,
Administrator of the Wage and Hour Division,
U. S. Department of Labor,
PLAINTIFF, APPELLANT,

v.

PORTLAND TERMINAL COMPANY,
DEFENDANT, APPELLEE.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

(Filed in Circuit Court of Appeals August 22, 1945.)

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MAINE.

CIVIL ACTION, FILE NO. 230.

L. METCALFE WALLING,
Administrator of the Wage and Hour Division,
United States Department of Labor, Plaintiff,

v.

PORTLAND TERMINAL COMPANY, Defendant.

COMPLAINT

[Filed January 17, 1945.]

I. Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 (Act of June 25,

1938, c. 676, 52 Stat. 1060; U.S.C. Title 29, Sec. 201 et seq.) hereinafter called the Act.

II. Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III. Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Maine, having its principal office and place of business at 222 St. John Street in the City of Portland, State of Maine, within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was, engaged in the operation, as instrumentalities of interstate commerce, of a railway system, shops, yards, stations, terminals and other railway facilities in and about the railway terminal area at Portland, Maine, which were and are engaged in the interstate transportation of passengers, freight, mail, express, and baggage, and were and are operating in interstate commerce to and from states other than the State of Maine, and in furnishing railway terminal facilities to other railroads engaged in interstate commerce.

IV. At all times hereinafter mentioned, defendant employed and is employing approximately 1150 employees in and about its railway system, shops, yards, stations, terminals, and other railway facilities, in the operation thereof as essential instrumentalities of interstate commerce. Substantially all of the duties performed by defendant's employees are essential to the movement in interstate commerce of locomotives, cars, trains, persons, freight, express, mail, and baggage in the active course of transportation to and from other states than the State of Maine, and are an essential and integral part of interstate commerce.

V. Defendant repeatedly has violated and is violating the provisions of Sections 6 and 15(a)(2) of the Act by

paying to many of its employees, for their employment in interstate commerce and in the production of goods for interstate commerce, as aforesaid, wages at rates less than thirty (30) cents an hour during the period from October 24, 1940, to March 1, 1941, since March 1, 1941, less than thirty-six (36) cents an hour and since August 31, 1942, less than forty (40) cents an hour, said rates of thirty-six (36) cents and forty (40) cents an hour being the minimum-wage rates made applicable to defendant and its said employees by the wage orders for the Railroad Carrier Industry heretofore duly promulgated pursuant to Sections 5 and 8 of the Act by the Administator of the Wage and Hour Division, United States Department of Labor and which, after publication in the Federal Register, became effective March 1, 1941, and August 31, 1942, respectively. A copy of the said wage orders is attached hereto as Exhibit A.

VI. On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII. Defendant, an employer subject to the provisions of the Act, repeatedly has violated and is violating the provisions of Section 11(c) and 15(a)(5) of the Act, in that since October 24, 1940, it has failed to make, keep, and preserve adequate and accurate records of its em-

ployees referred to as "strikers" and "trainees" as to the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the said regulations in that the records kept by defendant failed to show adequately and accurately, among other things, the hours worked each workday and each workweek, the regular rate of pay, the basis upon which wages are paid, the total straight-time earnings for each workweek, and the total weekly overtime excess compensation with respect to many of its employees.

VIII. The violations alleged in paragraph V and VII hereof occurred with reference to approximately 50 of defendant's employees, including road brakemen, yard brakemen, and locomotive firemen, during so-called training periods, during which time said employees were and are actively engaged in the performance or operation of some essential phase of defendant's activities or facilities. Prior to October 1, 1943, these training periods normally lasted for approximately two weeks, during which said employees received no compensation for their time spent or hours worked, were not listed or carried on defendant's payrolls, and no records were kept of their hours of work. At the beginning of this period, employees designated as "strikers" or "trainees" were required to learn the duties of the position for which they applied by reporting for a definite eight-hour shift, under the supervision of an experienced employee of defendant, and performing, after a short period of observation, the actual tasks involved in that position. At the completion of the training period, these "strikers" or "trainees" were placed on defendant's payroll and paid thereafter at the established rate for an employee in that position.

For the period since October 1, 1943, the training periods

have been shortened so that they range from a few days to not over ten days. The "strikers" or "trainees" are required to work a fixed eight-hour shift, and have no discretion as to the shift which they must work. The short period of observation is dispensed with and performance of actual tasks involved, under the supervision of an experienced employee of the defendant, starts immediately. When the "striker" or "trainee" is considered qualified, he is placed on defendant's payroll and is then paid $4.00 per day for each day of the training period. When he fails to complete the training period, or fails to qualify for any reason whatever, no compensation is paid for time spent and hours worked during that period.

IX. Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment permanently enjoining and restraining defendant, its officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Act, and such other and further relief as may be necessary and appropriate.

(s) DOUGLAS B. MAGGS,
Solicitor,

(s) ARCHIBALD COX,
Associate Solicitor,

(s) GEORGE H. FOLEY,
Regional Attorney,

(s) HARRY A. TUELL,
Attorney.

Post Office Address:
294 Washington Street, Boston 8, Massachusetts.

EXHIBIT A

For release Friday, February 14, 1941. R-1277

U. S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, WASHINGTON

TITLE 29—LABOR

CHAPTER V—WAGE AND HOUR DIVISION

IN THE MATTER OF THE RECOMMENDATION OF INDUSTRY COMMITTEE NO. 9 FOR MINIMUM WAGE RATES IN THE RAILROAD CARRIER INDUSTRY

WAGE ORDER

Effective March 1, 1941

[Filed in Clerk's Office, January 17, 1945.]

Part 591

WAGE ORDER MINIMUM WAGE RATES IN THE RAILROAD CARRIER INDUSTRY

WHEREAS, on November 2, 1939, pursuant to Section 5 of the Fair Labor Standards Act of 1938, hereinafter called the Act, the Acting Administrator of the Wage and Hour Division of the United States Department of Labor, by Administrative Order No. 34, appointed Industry Committee No. 9 for the Railroad Carrier Industry, herein called the Committee, and directed the Committee to recommend minimum wage rates for the Railroad Carrier Industry in accordance with Section 8 of the Act; and

WHEREAS, the Committee included four disinterested per-

sons representing the public and a like number of persons representing the employees in the Railroad Carrier Industry, and a like number representing employers in the industry, and each group was appointed with due regard to the geographical regions in which the Railroad Carrier Industry is carried on; and

WHEREAS, on August 15, 1940, after investigation of conditions in the industry, the Committee filed with the Administrator a report containing its recommendations for a 36-cent-per-hour minimum wage rate in the Trunk Line Division of the Railroad Carrier Industry, and for a 33-cent-per-hour minimum wage rate in the short line division of the Railroad Carrier Industry; and

WHEREAS, after notice published in the Federal Register on August 23, 1940, Henry T. Hunt, Esquire, the presiding officer designated by the Administrator, held a public hearing upon the Committee's recommendations at Washington, D. C., on September 23 and 24, 1940, at which all interested persons were given an opportunity to be heard; and

WHEREAS, the complete record of the proceeding before the presiding officer was transmitted to the Administrator; and

WHEREAS, all persons appearing at said public hearing before the presiding officer were given leave to file briefs on or before November 18, 1940; and

WHEREAS, oral argument was held on November 25, 1940, before the Administrator and

WHEREAS, the Administrator, upon reviewing all the evidence adduced in this proceeding and giving consideration to the provisions of the Act, with special reference to Sections 5 and 8, concludes that the Committee's recommendations for the Railroad Carrier Industry, as defined in Administrative Order No. 34, are made in accordance with

law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the Committee, will carry out the purposes of Section 8 of the Act; and

WHEREAS, the Administrator has set forth his decision in an opinion entitled "Findings and Opinion of the Administrator in the Matter of the Recommendatioss of Industry Committee No. 9 for Minimum Wage Rates in the Railroad Carrier Industry," dated this day, a copy of which may be had upon request addressed to the Wage and Hour Division, Washington, D. C.;

NOW, THEREFORE, IT IS ORDERED THAT:

SECTION 591.1—APPROVAL OF RECOMMENDATIONS OF INDUSTRY COMMITTEE.

The Committee's recommendations are hereby approved, and, in accordance with such recommendations,

SECTION 591.2—WAGE RATES.

(a) Wages at a rate of not less than 36 cents an hour shall be paid under Section 6 of the Act by every employer to each of his employees in the Trunk Line Division of the Railroad Carrier Industry who is engaged in commerce or in the production of goods for commerce;

(b) Wages at the rate of not less than 33 cents an hour shall be paid under Section 6 of the Act by every employer to each of his employees in the Short Line Division of the Railroad Carrier Industry who is engaged in commerce or in the production of goods for commerce; and

SECTION 591.3—POSTING OF NOTICES.

Every employer employing any employees so engaged in commerce or in the production of goods for commerce in the Railroad Carrier Industry shall post and keep posted in a conspicuous place in each department of each of his establishments where such employees are working such

notices of this Order as shall be prescribed from time to time by the Wage and Hour Division of the United States Department of Labor, and shall give such other notice as the Division may from time to time prescribe; and

SECTION 591.4—DEFINITION OF RAILROAD CARRIER INDUSTRY AND DIVISIONS THEREOF.

The Railroad Carrier Industry and the divisions thereof to which this order shall apply are hereby defined as follows:

For the purpose of this order the term "Railroad Carrier Industry" means the industry carried on by any express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act, and by any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such company or carrier by railroad: *Provided, however,* That the term "Railroad Carrier Industry" shall not include the industry carried on by any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

(a) The term "Trunk Line Division," as used in

this order, means the industry carried on (1) by any express company, switching company, terminal company, or sleeping-car company subject to part I of the Interstate Commerce Act, (2) by any carrier by railroad subject to part I of the Interstate Commerce Act having annual operating revenues of more than one million dollars ($1,000,000) as shown by such carrier's last annual report to the Interstate Commerce Commission or other regulatory body, and (3) by any company which is directly or indirectly owned or controlled by one or more such carriers, by one or more carriers under (b) hereof or by one or more such carriers jointly with one or more carriers under (b) hereof or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such company or carrier by railroad: *Provided, however,* That the term "Trunk Line Division" shall not include the industry carried on by any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

(b) The term "Short Line Division," as used in this order, means the industry carried on by any carrier by railroad, subject to part I of the Interstate Commerce Act, having annual operating revenues of less than one million dollars ($1,000,000) as shown by such carrier's last annual report to the Interstate Com-

merce Commission or other regulatory body, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such carrier by railroad: *Provided, however,* That the term "Short Line Division" shall not include the industry carried on (1) by any carrier or company included within paragraph (a) hereof or (2) by any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

SECTION 591.5—EFFECTIVE DATE.

This Wage Order shall become effective March 1, 1941.

Signed at Washington, D. C., ths 12th day of February, 1941. Sections 591.1 to 591.5, inclusive, issued under the authority contained in Sec. 8, 52 Stat. 1064; 29, U.S.C., Supp. IV, 208.

PHILIP B. FLEMING,
ADMINISTRATOR,
WAGE AND HOUR DIVISION,
U. S. DEPARTMENT OF LABOR.

Published in Federal Register, February 14, 1941.

For Release Saturday, August 15, 1942. R-1848

U. S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION

TITLE 29 — LABOR
CHAPTER V — WAGE AND HOUR DIVISION

IN THE MATTER OF THE RECOMMENDATIONS OF INDUSTRY COMMITTEE NO. 44 FOR MINIMUM WAGE RATES IN THE RAILROAD CARRIER INDUSTRY

WAGE ORDER

Effective August 31, 1942.

Part 624—Minimum Wage Rates in the Railroad Carrier Industry.

WHEREAS, on April 4, 1942, pursuant to Section 5 of the Fair Labor Standards Act of 1938, hereinafter called the Act, the Administrator of the Wage and Hour Division of the United States Department of Labor, by Administrative Order No. 147, appointed Industry Committee No. 44 for the Railroad Carrier Industry, herein called the Committee, and directed the Committee to recommend minimum wage rates for the Railroad Carrier Industry in accordance with Section 8 of the Act; and

WHEREAS, the Committee included four disinterested persons representing the public and a like number of persons representing the employees in the Railroad Carrier Industry, and a like number representing employers in the Industry, and each group was appointed with due regard to the geographical regions in which the Railroad Carrier Industry is carried on; and

WHEREAS, on April 29, 1942, after investigation of conditions in the Industry, the Committee filed with the Administrator a report containing its recommendations for a 40 cent per hour minimum wage rate in the Railroad Carrier Industry; and

WHEREAS, after notice published in the Federal Register on June 23, 1942, Major Robert N Campbell, the Presiding Officer designated by the Administrator, held a public hearing upon the Committee's recommendations at New York, New York, on July 15, 1942, at which all interested persons were given an opportunity to be heard; and

WHEREAS, the complete record of the proceeding before the Presiding Officer was transmitted to the Administrator; and

WHEREAS, although all persons appearing at said public hearing before the Presiding Officer were given leave to file briefs on or before August 5, 1942, no briefs were filed; and

WHEREAS, the Administrator, upon reviewing all the evidence adduced in this proceeding and given consideration to the provisions of the Act, with special reference to Sections 5 and 8, concludes that the Committee's recommendations for the Railroad Carrier Industry, as defined in Administrative Order No. 147 are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the Committee, will carry out the purposes of Section 8 of the Act; and

WHEREAS, the Administrator has set forth his decision in an opinion entitled "Findings and Opinion of the Administrator in the Matter of the Recommendations of Industry Committee No. 44 for a Minimum Wage Rate in the Railroad Carrier Industry," dated this day, a copy of which may be had upon request addressed to the Wage and Hour Division, 165 West 46 Street, New York, New York.

NOW, THEREFORE, IT IS ORDERED THAT:

SECTION 624.1—APPROVAL OF RECOMMENDATIONS OF INDUSTRY COMMITTEE.

The Committee's recommendations are hereby approved, and in accordance with such recommendations,

SECTION 624.2—WAGE RATE.

Wages at a rate of not less than 40 cents an hour shall be paid under Section 6 of the Act by every employer to each of his employees in the Railroad Carrier Industry who is engaged in commerce or in the production of goods for commerce; and

SECTION 624.3—POSTING OF NOTICES.

Every employer employing any employees so engaged

in commerce or in the production of goods for commerce in the Railroad Carrier Industry shall post and keep posted in a conspicuous place in each department of each of his establishments where such employees are working such notices of this Order as shall be prescribed from time to time by the Wage and Hour Division of the United States Department of Labor, and shall give such other notice as the Division may from time to time prescribe; and

SECTION 624.4—DEFINITION OF RAILROAD CARRIER INDUSTRY.

The Railroad Carrier Industry to which this Order shall apply is hereby defined as follows:

For the purpose of this Order the term "Railroad Carrier Industry" means the industry carried on by any express company, sleeping car company or carrier by railroad, subject to Part I of the Interstate Commerce Act, and by any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such company or carrier by railroad: *Provided, however,* That the term "Railroad Carrier Industry" shall not include the industry carried on by any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

SECTION 624.5—EFFECTIVE DATE.

This Wage Order shall become effective August 31, 1942.

Signed at New York, N. Y., this 13th day of August, 1942.

Sections 624.1 to 624.5, inclusive, issued under the authority contained in Sec. 8, 52 Stat. 1064; 29 U.S.C., Sup. IV, 208.

L. METCALFE WALLING,
ADMINISTRATOR,
WAGE AND HOUR DIVISION,
U. S. DEPARTMENT OF LABOR.

Published in Federal Register August 15, 1942.

[Title omitted.]

AMENDED ANSWER

[Filed April 3, 1945.]

I. The Complaint fails to state a claim against Defendant upon which relief can be granted.

II. Defendant admits the allegations contained in Paragraphs I, II, III and V of the Complaint.

III. Defendant denies the allegations contained in Paragraph V of the Complaint.

IV. Defendant admits the allegations contained in Paragraph VI of the Complaint.

V. Defendant denies the allegations contained in Paragraphs VII, VIII and IX of the Complaint.

VI. Further answering the Defendant says (1) that the Defendant is now and was at the time of the filing of the Complaint and for many years prior thereto engaged in the practice of training applicants for employment with it as yard brakemen; (2) that such applicants during the course of such training are sometimes referred to as "trainees," "strikers" or "students", and are hereinafter referred to as "trainees"; (3) that such "trainees" are trained for a period varying from two or three days to

two weeks (depending on the progress or prior experience of the particular applicant, the average training period being from six to ten days) in the yards and on the trains of the Defendant; (4) that such "trainees" are assigned to yard crews for training, such yard crews consisting at all times of a regularly employed conductor and two regularly employed brakemen qualified and competent to fully perform all of the duties assigned to such yard crews and that all such duties are fully performed by the regular members of such yard crews except such acts as are delegated to and performed by such "trainees" as an incident of their training and in the presence and under the direct supervision of the regular members of such yard crews; (5) that the presence of "trainees" in the yards or on the trains of the Defendant does not increase efficiency of operation of such yards or trains and does not result in any saving of expense to the Defendant as the acts performed by such "trainees" would otherwise be performed by the employees then engaged in instructing them; (6) that prior to October 1, 1943, such "trainees" received no compensation from the Defendant; (7) that since October 1, 1943, pursuant to an agreement entered into between the Defendant and the Brotherhood of Railroad Trainmen, the "trainees" who have completed their course of training and thereafter have been accepted by the Defendant for and have taken employment have received allowances as follows:

> *Student Brakemen*—"$4.00 per day, for each calendar day, with a maximum number of ten days, irrespective of the hours devoted or the miles made on any day, the student to devote not less than eight (8) hours each day to the service";

(8) that since October 1, 1943, "trainees" who have not completed their training or who after completing their training have not entered the employ of the Defendant,

have not received any compensation or allowances from the Defendant; (9) that such "trainees" have not been and are not accepted for employment after completion of their training unless and until they have passed examinations on the applicable operating and working rules and regulations of the Defendant; (10) that the Defendant has never considered, dealt with, or treated the "trainees" as its employees and that such "trainees" are not in fact its employees; (11) that each "trainee" upon making his application is advised by the Defendant and enters the training period with the knowledge and upon the understanding that employment is subject to prior completion of training, passing of the required examinations and approval of a designated officer of the Defendant and until such conditions have been completed he is not an employee and is not paid; (12) that the training practice followed by the Defendant is of long standing in the railroad industry and has been followed generally by railroads and terminal companies for many years.

Wherefore, the Defendant prays:

(a) That the Complaint of the Plaintiff be dismissed, and

(b) That the Court award to the Defendant its costs.

Dated: March 23, 1945.

PORTLAND TERMINAL COMPANY, *Defendant*,
By (s) LEONARD A. PIERCE,
(s) EDWARD W. ATWOOD,
Its Attorneys.
465 Congress Street, Portland, Maine.

The Plaintiff hereby consents to the amending of the Defendant's Answer heretofore filed by substituting and filing in lieu thereof this Amended Answer.

GEORGE W. JENSEN,
One of the Attorneys for the Plaintiff,
L. METCALFE WALLING, ADMINISTRATOR.

[Title omitted.]

TRANSCRIPT OF TESTIMONY

U. S. Court House,
Portland, Maine, 5th April, 1945.

The above entitled cause came on for hearing at ten-fifteen o'clock, Eastern War Time, on the above date, at the U. S. Court House, Portland, Maine, before Hon. John A. Peters, U. S. District Judge, without jury.

Appearances:

For Plaintiff: George W. Jansen, Esq.,
Supervising Attorney,
Wage and Hour Division, Dept. of Labor,
Washington, D. C.
Harry A. Tuell, Esq.,
Wage and Hour Division, Dept. of Labor,
294 Washington Street, Boston, Mass.

For Defendant: Leonard A. Pierce, Esq.,
Cook, Hutchinson, Pierce & Connell,
Portland, Maine.
E. Spencer Miller, Esq.,
232 St. John Street, Portland, Maine.

Mr. Jansen: May it please the Court, the issue in this case by the pleadings is pretty much simplified. I left with Court and counsel yesterday a copy of our preliminary brief. The only issue involved in the case is whether or not the defendant has violated the provisions of Section 6 of the Fair Labor Standards Act in failing to pay trainees during the training period, and the provisions of Section 11 (c) in failing to keep records in regard to its trainees.

The Court: They cannot be disassociated—those two?

Mr. Jansen: No, I don't think so; except that I might point out that while we are not making a vigorous argument in connection with that point, the language of the

Fair Labor Standards Act might seem to justify the argument that, even though the Court should find that they are not employees, they would still be required to keep records. But that really isn't the point involved in this case. In our complaint we allege that the defendant, Portland Terminal Company, trained both firemen and yard brakemen. It develops now that the Maine Central Railroad, which I believe is either the parent corporation or closely inter-related with the defendant Portland Terminal Company, actually trains the firemen. The answer of the defendant avoids any reference to the firemen, and, I suppose, for that reason. I might state to the Court that, in view of the fact that the Maine Central Railroad isn't a defendant here,—we are not litigating the question with reference to firemen—we apprehend that it will not be necessary, if the Court should decide this case favorably to the plaintiff, to bring another case against the Maine Central, because we think the issue will be decided as to firemen at the same time it is decided with regard to brakemen. In Paragraph 5 we have alleged two wage orders, and counsel has indicated that their denial of Paragraph 5 does not go to the denial of the fact that the wage orders are in fact issued. Is that correct?

MR. PIERCE: We do not deny the issuance of the orders.

THE COURT: The real issue is whether these people were employees. That's about the whole of it, isn't it?

MR. JANSEN: Yes. Mr. Thomas—

THE COURT: Do you want to call several witnesses and have them sworn at one time?

MR. JANSEN: Yes. We have several witnesses here. Some are here, and some are not here at this time.

(Fifteen individuals were then by the Clerk sworn as witnesses.)

MORTON A. THOMAS, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. JANSEN): Your full name is what? *A.* Morton A. Thomas.

Q. And you are Superintendent of the Maine Central Railroad? *A.* Yes.

Q. And also Superintendent of the Portland Terminal Company? *A.* Yes.

Q. Tell us, briefly, what your duties are as Superintendent of the Maine Central and Portland Terminal, both. Give us the Maine Central first, and then the Portland Terminal Company. *A.* General supervision over the Portland Division of the Maine Central property and crews working them.

MR. JANSEN: I would like to have the record show that this witness is called by the Plaintiff as an adverse witness.

THE COURT: Very well.

Q. Now, Mr. Thomas, we are concerned particularly in this case with the operations of the Portland Terminal Company. Your supervision relates not only to the Maine Central but to the Portland Terminal Company as well. Is that right? *A.* Yes.

Q. Are you paid by the Portland Terminal Company or by the Maine Central? *A.* Maine Central.

Q. The companies are inter-related, are they? *A.* I don't know. No. They are two separate companies, as far as I know.

Q. I mean there is a close relationship, at least, between the two companies? *A.* Yes.

Q. And the Portland Terminal Company performs terminal facilities here in Portland for the Maine Central? *A.* Yes.

Q. And the Boston & Maine Railroad? A. Yes.

Q. And interchanges cars with the Grand Trunk line? A. Yes.

Q. Is that the Canadian National? A. Yes.

Q. When a train of either the Boston & Maine or the Maine Central enters into the terminal, that comes within the jurisdiction, or under the jurisdiction, of the Terminal Company? They switch the cars? A. Yes.

Q. They service the engines? A. Yes.

Q. Do they add any new cars or take off passenger cars from the train and break down and make up freight trains for both railroads? A. Yes.

Q. They also deliver freight cars to various points in and around Portland, within the terminal? A. Yes.

[Thereupon document was marked as Plaintiff's Exhibit No. 1.]

Q. I show you Plaintiff's 1, and I will ask you whether or not that is a map or the facilities of the Portland Terminal Company? A. Yes.

Q. And indicated on the map are a number of parts of it that have been stricken out in pencil. Those facilities are no longer in service? For instance, at Thompson's Point there is a yard indicated, and that is stricken out in pencil. That is no longer in service? A. Yes. That is right.

Q. And this bridge, just north of South Portland—across Fore River? That bridge is no longer in service? A. That bridge is no longer in service. No.

Q. And Wharf Number Five is no longer in service? A. No.

Q. And this part of the facilities indicated across from the State Pier, near the Portland breakwater light—that is no longer in service? A. No.

Q. And the interchange—that is indicated up near the Portland Junction between Grank Trunk and the Portland

Terminal Company; that is no longer in service? *A.* That is right.

Q. Anything else here that isn't in service that I haven't pointed out?

THE COURT: Is that particularly important?

MR. JANSEN: Not particularly; but I think we ought to include it.

A. I don't know that there is.

Q. This map represents the facilities of the Portland Terminal Company, with the exception of some facilities outside the City of Portland, at Westbrook and Cumberland Mills or some other place? *A.* Yes. There are such places.

MR. JANSEN: We offer Plaintiff's Exhibit 1.

MR. PIERCE: No objection. I want this record to show this, in regard to the statement of Mr. Jansen about an adverse witness. The witness is employed by the Company,—

THE COURT: I understand. Not necessarily adverse. He is employed by the railroad. Counsel assumes he is adverse. His assumption doesn't bind the Court.

MR. JANSEN: If there is any question about it, this man is the Superintendent . . .

THE COURT: The question is whether he is adverse. You said he was an adverse witness. That is a designation that is wholly your own. Go ahead.

MR. PIERCE: I think it might indicate that Mr. Thomas' testimony isn't the truth—that Mr. Thomas isn't telling the truth.

THE COURT: I assume everybody will tell the truth. Go ahead.

Q. Now, to save time, Mr. Thomas, the Terminal has stations at Portland Union Station, Deering Junction,

Cumberland Mills, Westbrook and Woodfords? *A.* No station at Woodfords.

Q. No station at Woodfords? *A.* No.

Q. But they have stations at those other points I have named? *A.* I think so. I can't remember all you named.

Q. Union Station, Deering Junction, Cumberland Mills and Westbrook? *A.* Yes.

Q. Your Yard offices are located at Rigby Yard No. 7, 8 and 1? *A.* Yes.

Q. Yard No. 1 is the freight-house? *A.* Yes.

Q. And the board which lists the employees and their assignments is kept at Rigby? *A.* Yes.

Q. The Terminal Company operates over practically 126 yards of tracks, with 107 main line switches and 608 side track switches. Do you know that to be a fact? *A.* No, I couldn't tell you about that.

Q. Do you know how many combined engineers and trainmen you employ generally—usually? Would you say about 150 to 175? *A.* Which?

Q. Engineers and trainmen combined?

MR. PIERCE: You are now talking about the Portland Terminal Company?

MR. JANSEN: Yes, Portland Terminal Company. *A.* Well, as far as the trainmen are concerned, they run up over 100.

MR. JANSEN: Perhaps I can save time.

[Conference, off the record.]

MR. PIERCE: All right.

MR. JANSEN: It is agreed that the record may show that the number of miles of track operated are 126; switches in the Terminal area 107 of the main line and 608 side track; number of trains served daily, or serviced daily, approximately 93 in and out; number of locomotives owned by the

Portland Terminal Company, 23; number of locomotives handled by them are 65 a day, approximately. Then they have employees in the following groups: Roundhouse employees, mechanics and helpers, approximately 203; laborers approximately 75; yard crews, engineers and trainmen, approximately 174; station and yard employees other than engineers and trainmen, approximately 438; and all other employees, including maintenance-of-way employees, approximately 373.

Q. Now, Mr. Thomas, trainmen are divided into two classifications—engineers and ground crews, in the case of the Portland Terminal Company? *A.* No.

Q. How would you divide them? *A.* I don't understand you. You said "trainmen are divided"?

Q. Yes. *A.* Trainmen have nothing to do with engineers.

Q. Then you have engineers *and* trainmen? *A.* In the Portland Terminal Company?

Q. Yes? *A.* Yes.

Q. Operating the train? *A.* Operating the switchers.

Q. Well, the engineers operate the engines? *A.* Yes.

Q. They are the engineers and firemen? *A.* Yes.

Q. And the trainmen are the conductor and the yard brakemen? *A.* Yes.

Q. You also refer to them as foremen and helpers? *A.* In some parts of the country. Yes.

Q. The yard brakemen are in some places referred to as the switchmen? *A.* I think that is right.

Q. And these men, if they are on a regular shift, report to the same yard office each day? *A.* Same location. Yes, sir.

Q. If they happen to be on the spare board they report wherever they are told to report? *A.* Yes, sir.

Mr. Pierce: You are now discussing trainmen?

MR. JANSEN: Yes.

MR. PIERCE: You understood that is what he is asking about, Mr. Thomas? *A.* Yes. Trainmen.

Q. Now, the Portland Terminal Company has for many years been engaged in the practice of training yard brakemen. Is that right? *A.* So far as I know. Yes, sir.

Q. How long have you been with the Portland Terminal Company? *A.* Nearly two years.

Q. And before that time what railroad were you with? *A.* With the Boston & Maine.

Q. Boston & Maine? *A.* St. John & L.C., and M. & W. Railroad.

MR. PIERCE: Just give the full names, if you will Mr. Thomas. *A.* St. Johnsbury & Lake Champlain Railroad—

Q. You are not very familiar with the practice of the Portland Terminal Company prior to the time you came with them? *A.* No.

Q. How long has Mr. Quincy been with the Company? *A.* I can't tell you. Quite a long while.

Q. Longer than you? *A.* Yes, sir.

Q. At the present time the Company is operating under some kind of an agreement with the Brotherhood of Railroad Trainmen, with regard to trainees? *A.* A supplement to their agreement. Yes, sir.

Q. Are you familiar with the agreement and the terms of the agreement betwen the Railroad and the Brotherhood; and the forms that are used by the Railroad in connection with trainees? *A.* Yes, sir. I think so.

THE COURT: By "Railroad" you mean the Terminal Company?

MR. JANSEN: Yes. The Terminal Company is all we are talking about in this case.

Q. When a man applies for a job with the Portland

Terminal Company, as a yard brakeman, he is given an eye test and a physical examination first? *A.* Yes.

THE COURT: And a what? Given a what?

MR. JANSEN: Given an eye test and a physical examination.

Q. If he passes his eye test and the physical examination, he is then assigned to a particular conductor for training? *A.* Well, of course, there is more goes with that than you have spoken of.

Q. What? *A.* A talk or conversation with the applicant before he is—before he has taken the eye test or the physical examination.

Q. You have some conversation with him, and have him sign some other papers, too, don't you? *A.* Yes. Sign his application.

[Thereupon document was marked as Plaintiff's Exhibit Number 2.]

[Further documents were produced at this time and marked as Plaintiff's Exhibits 3 and 4.].

Q. I show you Plaintiff's Exhibit 2; that is the first thing that an applicant is asked to sign, it it not? *A.* No.

Q. Which of these blanks 2, 3 and 4, is the applicant asked to sign first? *A.* Neither.

Q. You have something else that he has to sign? *A.* Yes.

Q. What is it? *A.* The eye and ear test examination.

Q. Is that on here as part of Exhibit 2? *A.* No. We don't use that *(indicating)*.

Q. You don't use that? *A.* No.

Q. Do you have one of the forms for the eye and ear test or examination with you? *A.* No.

Q. That is just with reference to the time when he goes to have his eye test? Questions are asked and he signs to indicate that he has the test? *A.* Indicates that he had,

and it is explained to him if there is no defect in his vision, etc.

Q. And the same thing is true of the physical examination? He has to answer certain questions the doctor asks him, and sign the form? *A.* Yes.

Q. And the next thing he signs is Plaintiff's Exhibit 2? *A.* Yes.

Q. And that is a form that has on the top of it "Boston & Maine Railroad", but you use that form in connection with the Portland Terminal Company? *A.* Yes.

Q. And I suppose wherever the "Boston & Maine" appears in the form you strike that out and put in "Portland Terminal Company"? *A.* That is correct.

Q. At the end of the form is a form of release. Is that executed by the applicant at the same time? *A.* Yes, sir.

Q. And there, again, you strike out the name "Boston & Maine" and insert "Portland Terminal Company"? *A.* That is right.

Q. Then, at the same time, the applicant signs Plaintiff's Exhibit Number 3, does he not? *A.* Yes. That is Exhibit 3; Form Number 1.

Q. And on this Exhibit 3 I will call your attention to the words "without compensation" which have been stricken out. Prior to October 1, 1943, those words were in the form when it was signed by the applicant? *A.* Yes, sir.

Q. *Now* these words are stricken out and the same form is used. Is that right? *A.* Yes.

Mr. Jensen: I offer Plaintiff's Exhibit No. 2 and Plaintiff's Exhibit No. 3.

Mr. Pierce: No objection.

The Court: Admitted.

Q. Now, after those forms have been signed by the applicant, you then give him a form similar to Plaintiff's Ex-

hibit 4, which I am now showing you. Isn't that right? *A.* Well, that is after the physical examination and all those things. Is that what you mean?

Q. Yes. *A.* Yes.

Q. This Form—Plaintiff's Exhibit 4—that I am showing you, is in blank, but it is addressed, when it is given to an applicant, to a specific conductor, like Mr. Gleason or Mr. Pettix or O'Neil or one of your conductors? *A.* Yes.

Q. And it is dated, and the name of the applicant is filled in? *A.* Yes.

Q. And do you sign it as Superintendent? *A.* No, I don't.

Q. Someone signs it for you? *A.* Yes. Someone signs it for me.

Q. And that form—Plaintiff's Exhibit No. 4—is in use now? *A.* Yes.

Q. And, as far as you know, was in use prior to October 1, 1943? *A.* As far as I know.

MR. JANSEN: We offer 4.

MR. PIERCE: No objection.

THE COURT: Admitted.

Q. Who pays for the eye test and the physical examination? *A.* There is no charge for the eye test. That is given by our Examiner. And the aplicant pays for the physical examination.

Q. Two dollars, is it? *A.* I don't know.

Q. Can he go to any doctor that he may choose for the physical examination, or is he sent to the Company doctor? *A.* He is sent to the Company doctor.

Q. And he pays the Company doctor when he takes the examination? *A.* Yes.

[Thereupon documents were marked as Plaintiff's Exhibits 5 and 6.]

Q. Calling your attention, Mr. Thomas, to Plaintiff's Exhibit 5; you had better read that carefully.

[Witness examines document in question.]

Q. (*continued*): I will ask you whether or not that is the form that is used by your company, and has been in use for a number of years, and is signed by the conductor and returned to either your office, or to the Assistant Superintendent's office, after the trainee has completed his training? I might say, Mr. Thomas, that that is a copy that we wrote out, and therefore it may not look familiar to you? *A.* I don't know whether that form is used or not—in all cases.

Q. Calling your attention to Plaintiff's 6, I will ask you to examine that carefully and tell us whether or not that is used by, and has been used by, the Portland Terminal Company? *A.* Yes, sir.

Q. And what does Plaintiff's 6 represent? *A.* Report of the Reviewing Board of the application of certain men.

Q. And who is the Reviewing Board? *A.* At this time it is the Superintendent and two trainmasters. [*Indicating paper*].

Q. At that— Is that a report that is made out in connection with the examination for flagman, that the employee takes—or is that a report that is made after he has completed his training? *A.* After he has completed his training.

Mr. Jansen: I will offer Plaintiff's Exhibits 5 and 6, if you have no objection.

Mr. Pierce: Well, you were having kind of a heart-to-heart talk with Mr. Thomas. I couldn't hear what he said about 6.

[Conference, off the record, and testimony read.]

Mr. Pierce: No objection.

THE COURT: Admitted.

Q. Now, Mr. Thomas, before October 1, 1943, the time spent by the applicant during what you would call a training period wasn't paid for at all by the Portland Terminal Company. Is that right? *A.* That is right.

Q. And since October 1, 1943, if the applicant completes his training period and goes on the board, you pay him four dollars a day for the time spent in training? *A.* Yes.

Q. If he doesn't complete the training period you pay him nothing, regardless of how many days' time he may spend. Is that right? *A.* That is right.

THE COURT: Suppose he completes his training period, but is not employed?

Q. How about that, Mr. Thomas?

THE COURT: Does the man who completes his training period . . . *A.* Necessarily he goes on the board and goes to work as an employee.

THE COURT: What do you mean by "board"? *A.* It is the board where we carry the names of all spare men.

THE COURT: It is a list of spare men? *A.* Yes.

THE COURT: Does he necessarily go to work immediately? *A.* He goes on the board.

THE COURT: Do you call that "going to work"? *A.* Yes. When he goes on the board he becomes an employee.

THE COURT: He is paid then? *A.* Not until he catches a job.

MR. PIERCE: What happens if he is accepted and put on the board and there doesn't happen to be an available train for him? What happens about that four dollars? *A.* He can collect if he goes on the board.

MR. PIERCE: Whether he is actually assigned to a train or not? *A.* Yes.

THE COURT: Does he go on the board automatically when he completes his period of training? *A.* And is OKed by the conductor. Yes, sir.

THE COURT: Does anyone complete their training and not go on the board? *A.* Not that I know of. No, sir.

Q. In other words, when an applicant receives this written OK, such as is indicated by Plaintiff's Exhibit 5, and goes on the board, then you pay him four dollars retroactive for the time spent in training? *A.* He can get his money any time after he has gone on the board.

Q. And I assume when you pay him the four dollars you deduct the railroad retirement tax? *A.* I don't know.

Q. Who would know that? *A.* The Chief Timekeeper.

Q. Is he here. *A.* I haven't seen him.

Q. Would Mr. Strout or Mr. Quincy know that? *A.* No, I don't think so.

Q. He doesn't take any other examination, other than the eye test and his physical examination, and spend this time in training and get the approval of the conductor before he goes on the board and is paid the same as anybody else when he gets a job—that is, when he gets a run? *A.* No. There is no other examination.

Q. No other examination at all? *A.* No.

Q. No examination with regard to the rules? *A.* No.

Q. Or any examination with regard to the lay-out of the Yard—the switches and blocks? *A.* No, sir.

Q. Do you discuss the application and do you talk to each applicant? *A.* Do I?

Q. Yes? *A.* No, sir.

Q. You don't have any talk with them at all? *A.* No.

Q. So whatever is said to the applicant is hearsay, so far as you are concerned? *A.* Yes.

Q. Are you familiar with the agreement that was entered

into with the Brotherhood of Railroad Trainmen in October of 1943? *A.* Yes.

Q. That was an agreement entered into because of the war emergency; is that right? *A.* Because of the inability to get sufficient men.

Q. You were having trouble at that time getting men? *A.* Yes, we were short of men.

Q. So for the duration of the war, at least, you entered into this agreement with the Brotherhood of Railroad Trainmen? *A.* With the hope that it would induce some men to become employees.

Q. And this agreement is designed to last for the duration of the present emergency? *A.* Yes, sir.

Q. And after the emergency, I assume, you will go back to your old practice? *A.* Well, I don't know a thing about that.

Q. So far as this agreement is concerned, you will? *A.* That is right.

[Document marked Plaintiff's Exhibit No. 7.]

Q. I show you Plaintiff's Exhibit 7, and ask you whether or not that is the agreement between the Portland Terminal Company and the Brotherhood of Railroad Trainment, effective October 1st, 1943? *(Witness examines paper.)* *A.* It doesn't seem as though that reads just the same as the agreement does,—but I am not sure.

Q. I got that from Mr. Miller, your attorney. *A.* It seems as though this wording right here *(indicating)* is different.

[Conference between counsel, off the record.]

Mr. Pierce: Well, Mr. Jansen, if you will show us that agreement we will tell you whether it is correct or not, and not bother the witness.

Mr. Jansen: All right. I will be glad to.

[Counsel examines exhibit.]

MR. PIERCE: We will admit that Plaintiff's Exhibit 7 is an accurate copy of a letter written by Mr. M. F. Rolfe, Assistant to the General Manager, to Mr. W. E. Easler, General Chairman of the Brotherhood, and acknowledged by Mr. Easler.

MR. JANSEN: We offer Plaintiff's Exhibit 7 in evidence.

THE COURT: Admitted.

Q. Now, Mr. Thomas, in connection with this training of these applicants for the job of yard brakeman, are any instructions given to the conductors, other than this letter that is sent to the conductor along with the applicant? A. No special instructions. No.

Q. Do you have any general written instructions, or any general instructions to conductors, written or verbal, with regard to this training of these applicants? A. No.

Q. Do you have any rules—written rules or verbal rules—that are given to the conductors or any other of the regular trainmen, with regard to the training of these applicants, other than is contained in these documents that have been received in evidence? A. Not that I know of.

Q. Now, Mr. Thomas, how many compose a crew of trainmen in the Portland Terminal Company? A. By that you mean the ground crew?

Q. Yes? A. Conductor and two brakemen.

Q. Conductor and two brakemen? A. Yes.

Q. And I assume that ordinarily, when an applicant such as we have been talking about is sent out to the conductor, he is an extra man on the crew? A. Yes.

Q. Are there any occasions when he is required to serve as a member of the crew? A. None that I now of.

Q. None that you know of? A. None that I know of. No, sir.

Q. Do you keep any records with regard to these trainees or strikers—any records at all? *A.* What sort of records?

Q. Do you keep records as to the hours worked, for example? *A.* No.

Q. Do you keep a record of their name and address? *A.* Well, that is on the application.

Q. Other than the application, and the record that you eventually get from the conductor as to the number of days and the dates that trainee worked, you keep no other records of these trainees. Is that right? *A.* That is right.

Q. And, if they don't complete the training period, you destroy the records, practically immediately? *A.* No, I wouldn't say that. I don't think the records are destroyed.

[Document marked Plaintiff's Exhibit No. 8.]

Q. Mr. Thomas, I show you Plaintiff's Exhibit 8, and I will ask you whether or not that is a list of all the men who have trained with the Portland Terminal Company, that has been furnished us by the Company—men who have trained since January 1, 1942, to March 20, 1945? *A.* I don't know.

Q. Oh, you haven't seen this before? *A.* No.

Q. I see. Do you know who made up this list? *A.* No. I don't.

[Conference, off the record.]

MR. PIERCE: We will admit that that is what it says it is.

MR. JANSEN: Plaintiff's Exhibit No. 8 is offered in evidence.

MR. PIERCE: It is admitted that it is what is purports to be, according to the heading at the top.

THE COURT: Admitted, with that understanding.

MR. PIERCE: It is admitted that the document, as admitted, includes the pencilled notations on the margin.

THE COURT: Very well.

[Thereupon documents were marked Plaintiff's Exhibits 9 and 10.]

Q. I show you . . . Well, just a minute.

[Conference, off the record.].

Mr. Jansen: Plaintiff's 9 and 10 were lists which were furnished to us by the Defendant.

Mr. Pierce: It is admitted, as to both 9 and 10, that they may be admitted and that they are correct in accordance with the headings at the top of each.

Mr. Jansen: They are offered, may it please the Court.

The Court: Admitted.

Q. Now, Mr. Thomas, are you familiar with the records of the Company? With regard to men who have trained and haven't completed the training? *A.* Not particularly. No.

Q. You don't have any way of knowing whether Plaintiff's Exhibit 10, which you have before you, is a complete list of all the men who have trained and have not yet completed the training; or not? *A.* No, sir. I don't.

Q. Do you recall there was some discussion, in which you took part, with reference to a man by the name of Richard Anderson? *A.* Discussion when, and where?

Q. Back in October or November; with regard to Anderson, who worked as trainee for one day? *A.* I remember the case. Yes.

Q. He did actually work as trainee for one day, didn't he? Or was actually in training for one day? *A.* I think so. I am not sure just what the record is.

Q. Will you look and see if he is on that list? *A.* No, I don't see his name on the list.

Q. You don't keep the hours each work-day or each work-week, of the men in training—in the records of the company—do you? *A.* No, sir.

Q. You don't make any entries in the records with refer-

ence to their pay while they are in training. Is that right? *A.* What records?

Q. The records of the Company? *A.* Yes. I expect the records would show if the men had been paid.

Q. And would that show that he has been paid four dollars a day for the days that he is in training? *A.* I would expect that would be what it would show, as they would be kept in the Paymaster's office.

Q. And the man who doesn't complete his training, there would be no reference to pay whatsoever. Is that right? *A.* I think that is correct. Yes, sir.

Q. The trainee stays with the same conductor during his entire training period, doesn't he? *A.* Not necessarily. No.

Q. He is assigned to a given conductor? *A.* Yes.

Q. And ordinarily he stays with the same conductor? *A.* Ordinarily, I would say yes.

Q. You don't keep any records of the trainees with reference to the work-week during their training period? *A.* No.

Q. It is the record of the actual days work that is turned in by the conductor in that manner that you pay him at four dollars a day? *A.* Yes.

Q. And before October, 1943, you paid him nothing; so you had no record of any pay being paid to him. Is that right? *A.* Yes.

Q. Who did you tell us could tell us about deductions made on account of railroad retirement deductions? *A.* Mr. Parker.

Mr. Jansen: That is all, Mr. Thomas.

Cross Examination.

X-Q. (by Mr. Miller): Mr. Thomas, does an applicant for a Portland Terminal Company job see any particular man in the first instance? *A.* Yes. He either sees Trainmaster Strout or Mr. Johnson, who is Chief Clerk for Mr. Quincy.

X-Q. Where is Trainmaster Strout's office located? A. In the General Office building.

X-Q. 222 St. John Street? A. Yes.

X-Q. And is Mr. Strout a Portland Terminal Company official? A. No, sir. Maine Central.

X-Q. How does it occur that an applicant for a Portland Terminal Company job sees Mr. Strout? A. Well, it is for convenience to the applicant. If he had to go to Rigby to see Mr. Johnson first, and then come back to the city for his physical examination, it makes two or three trips which are apparently unneccessary; so we arrange for Mr. Strout to handle the preliminary end of it.

X-Q. And after leaving Mr. Strout's office, where does the applicant go? A. To the doctor. And from there to Rigby yard office.

X-Q. And to whom does he report at Rigby? A. To Mr. Johnson, who is Mr. Quincy's Chief Clerk.

X-Q. And what is Mr. Quincy's position, or title? A. Assistant Superintendent of the Portland Terminal Company.

X-Q. Whether or not it is true that some applicants, in the first instance, see Mr. Johnson? A. Yes, that is true.

X-Q. And to do that they have to go to the Rigby yards? A. Yes, sir.

THE COURT: How far away is that? A. Two and a half miles, or three miles.

X-Q. I show you this paper, and ask you if that is the application blank which Mr. Jansen showed to you? A. Mr. Jansen? Is that this gentleman here?

X-Q. Yes. A. Yes. That is either the same blank or a copy of it.

MR. MILLER: May the record show that that is Plaintiff's 2?

X-Q. I show you Plaintiff's Exhibit No. 2, and ask you

to read the first lines of the second paragraph. *A.* (*reading*): "Application for: Student privileges in . . . Employment in . . . Re-examination for . . . Promotion to . . ."

X-Q. So that application, Plaintiff's Exhibit 2, refers to four different alternative positions. Is that correct? *A.* That is right.

X-Q. Whether or not, in making out the application, some of them are crossed out? *A.* Yes, sir. The ones that don't apply.

X-Q. And in the case of an applicant for a Portland Terminal Company position who has had no previous experience, which items are crossed out? *A.* All but the first.

X-Q. Will you read the first, please? A. (*reading*): "Student privileges in . . .".

X-Q. Will you describe in general, Mr. Thomas, what the nature of the instruction given to a trainee is?

MR. JANSEN: Just a moment. Witness has already testified that whatever is said is hearsay, so far as he is concerned.

MR. MILLER: I think that was with reference to the conversation between either Mr. John and the applicant or Mr. Strout and the applicant; but I'll put the question another way.

X-Q. From your experience, Mr. Thomas, are you aware of the nature of instructions given to trainees on the Portland Terminal Company property? *A.* Yes.

X-Q. Will you tell the Court, in general, what sort of instruction that is?

MR. JANSEN: I object to that.

THE COURT: Those are the instructions you require to be given? *A.* Yes.

THE COURT: He may answer.

A. He is instructed how to handle switches, how to man-

ipulate hand-brakes, hitch hose, give hand and lantern signals; and he is especially instructed on how to do the job safely for his own sake.

X-Q. On the average, how long does it take before a trainee completes his course of instruction? *A.* I should think the average would be somewhere in the vicinity of seven or eight days.

THE COURT: What does the time depend on? *A.* The time depends on the individual, to a large extent.

THE COURT: On his aptitude? *A.* Yes. And also, of course, some fellows have been around the railroad considerably and know quite a little about it before they start.

X-Q. Does the trainee only observe, or does he also do some acts? *A.* Oh, he does some acts.

X-Q. And, in doing those acts, does he take the place of a regular member of the crew? *A.* No, sir.

X-Q. Whether or not the regular crew is in full strength at all times? *A.* Yes, sir.

X-Q. And, in your opinion, does the presence of the trainee aid the crew? *A.* No. I would say it was a detriment to the crew.

X-Q. Why do you say that? *A.* Because they have to watch out for this fellow all the time, to see that he doesn't get hurt; and also, if they direct him to throw a switch, they have to go over with him and see that he does it correctly, and so forth; and they could do it quicker themselves than they could with him. Than they could with him along.

X-Q. Does the Portland Terminal Company have certain rules which trainees have to live up to? *A.* Well, during the training period all the trainee knows about rules is what is told him by the instructor in charge.

X-Q. Are there any penalties or discipline for infraction of rules by a trainee? *A.* Oh, no.

X-Q. Suppose a trainee appears Monday morning and spends an hour with the crew, and then leaves and comes back Tuesday. What happens? *A.* Nothing happens.

X-Q. Well, is he taken back? *A.* Yes.

MR. JANSEN: Has that ever occurred, Mr. Thomas? *A.* I think it has. Yes.

MR. JANSEN: Do you know that it has? *A.* No. I couldn't testify that I knew that it has.

MR. JANSEN: It is just . . .

THE COURT: I think, perhaps, you had better wait until it is your turn to examine him.

X-Q. If it did happen, would the answer be the same? That he would be taken? *A.* Yes.

X-Q. You told Mr. Jansen of the positions you held as railroad man. Will you recite those again, and tell us where you were stationed? *A.* I was with the Boston & Maine Railroad, from 1910 to 1938, stationed at Lyndonville, Vermont, White River Junction, Vermont, Woodsville, New Hampshire; and from 1938 to 1939 I was Superintendent of the St. Johnsbury, Lake Champlain & Montpelier and Wild River Railroad, stationed at Montpelier, Vermont.

X.Q. Did the Boston & Maine Railroad have trainees at White River? *A.* Yes.

X-Q. And Woodsville? *A.* I don't recall any at Woodsville.

X-Q. Did the St. Johnsbury & Lake Champlain have trainees at Bangor? *A.* Yes.

X-Q. And you were Superintendent of the Maine Central's Eastern Division at Bangor? *A.* Yes.

X-Q. For what years? *A.* 1939 to 1942.

X-Q. And whether or not trainees at those points on those railroads received remuneration for the time spent training? *A.* They did not.

X-Q. Did you consider those trainees employees? *A.* No.

X-Q. With reference to the present arrangement on the Portland Terminal Company, for paying four dollars a day to a man whose name goes up on the board after he has finished training,—is that intended as a permanent arrangement? *A.* No. According to the agreement it is a temporary arrangement for the duration.

Redirect Examination

Q. (by Mr. Jansen): Mr. Thomas, you said something about a man working for an hour one day and then coming back—leaving and coming back the next day. Do you know of any instance where a man has worked less than eight hours in this training period? *A.* No. I don't actually know. I have heard of those cases very often.

Q. Do you recall any specific instance where you may have heard of that of a specific employee? *A.* I can't give you dates or names. No.

Q. As a matter of fact, Mr. Thomas, your present agreement with the Brotherhood requires that they spend at least eight hours on the job, doesn't it? Eight hours per day? *A.* No. I don't think so.

Q. Let me read it to you. (*Reading*): "Effective October 1, 1943, and for the duration of the present emergency, Student Brakemen, Road or Yard, will be made an allowance of $4.00 per day, for each calendar day, with a maximum number of ten days, irrespective of the hours devoted or the miles made on any day, the Student to devote not less than eight hours each day to the service." That is your agreement with the Brotherhood, isn't it? *A.* Yes.

Q. And that does require he spend at least eight hours a day, doesn't it? *A.* Yes.

Mr. Pierce: The question of what the document requires is for the Court and not the witness. He doesn't get the four dollars unless he stays there eight hours?

Q. Is that right? A. He is paid on a calendar day basis, as far as the four dollars is concerned.

Q. Prior to October 1, 1943, you required each of the trainees to spend at least two weeks regardless of how apt they were, didn't you? A. No. Not necessarily.

Q. Do you know a man by the name of Joseph Libby? A. No, sir.

Q. You don't know him? A. No, sir.

Q. Has it been your experience that the presence of trainees has retarded the work? A. That is my opinion.

Q. That is your opinion? A. Yes.

Q. You don't know from experience? Is that right? I asked you if it has been your experience? A. What do you mean by "experience"?

Q. Have you actually observed that it has retarded the work? A. Yes, I have actually observed, and it is my opinion that it does.

Q. You know, as a matter of fact, that trainees who are assigned to crews are required to stay the full eight hour shift? A. No. Not necessarily.

Q. Or, if the crew works ten or twelve or thirteen hours, as in the case of Mr. Gleason's crew, they stay the full ten hour shift? A. If they desire.

Q. And you know that they do? A. I think they do at most times. I don't say that they do all the time, because I don't know.

Q. And you know that the conductors have reprimanded trainees because they were late? A. Conductors don't do the reprimanding.

Q. I asked you if you knew that the conductors have done that? A. No.

Q. The conductor is in charge of the crew, isn't he? A. Yes.

Q. He tells them when to go to lunch? *A.* Yes.

Q. Do you know that the conductor has in some instances refused to let the trainee go to lunch until the rest of the crew has gone? *A.* No.

Q. You don't know any of these things as to how they actually operate out in the yard? *A.* Only from observation.

Q. Are you familiar with the newspaper advertising that the Portland Terminal Company and the Maine Central has embarked on in connection with the training of brakemen? *A.* No.

Q. You are not? *A.* No. I have seen it in the paper. Is that what you mean?

Q. Yes. *A.* I have seen some of them in the paper. Yes.

Mr. Jansen: May I ask counsel if he objects to the foundation . . . (Conference off the record.) I might state for the purposes of the record that we have in mind offering, and do offer—wish to offer—the issues of the Portland Evening Express for January 12th and 25th, 1944, and in particular that part of an advertisement of the Maine Central Railroad relating to yard helpers, yard trainmen for Rigby Yards. In both of these ads—an ad in each of the issues—and I asked counsel if he objected to the foundation . . .

The Court: Do you mean the authenticity?

Mr. Jansen: Yes.

The Court: He probably doesn't.

Mr. Pierce: No. I don't. I object to the advertisement of the Maine Central Railroad . . .

The Court: Of course, I don't know what you are talking about. I haven't seen it.

Mr. Pierce: Show it to the Court.

[Mr. Jansen shows book to the Court.]

MR. JANSEN: We could read into the record that part of the ad with reference to the yard helpers.

THE COURT: Well, I haven't read it. I notice it is Maine Central . . .

MR. JANSEN: The Maine Central Railroad has nothing to do with the yard men in the Rigby yard, except as they might be doing it for the Portland Terminal Company.

THE COURT: I haven't seen anything yet which brings the Maine Central Railroad in as a party, have I?

MR. JANSEN: No. The Maine Central Railroad has nothing to do with the yard trainmen in the Rigby yards. Whatever they are doing they are doing for the Portland Terminal Company.

[Conference at bench.]

MR. JANSEN: Are you making the point now that the Portland Terminal Company has nothing to do with that ad?

MR. PIERCE: I make the point that that ad purports, on its face, to be an ad of the Maine Central Railroad.

MR. JANSEN: Yes, but are you making a point that the Maine Central Railroad is the party which appears in this ad—when it appears this man is Superintendent of Maine Central and Portland Terminal Company—one hand washes the other. If I thought that was going to come up we could easily have made the Maine Central a party defendant.

MR. PIERCE: I don't know as Your Honor is interested in the discusion, but I am not making a captious objection. What the Maine Central does the Maine Central Railroad is liable for.

THE COURT: Of course it is perfectly obvious that they can't by an ad in the paper, bind another party to a contract. That is all there is to it, so far as I can see.

MR. JANSEN: On that point he is absolutely right.

THE COURT: The objection is sustained.

MR. JANSEN: That is all the questions we have. Oh! One further question.

Q. Do I understand correctly that you are the Superintendent both for the Maine Central Railroad and for the Portland Terminal Company? *A.* Yes.

Q. Do you get paid by the Maine Central? *A.* Yes.

Q. But you perform duties for the Portland Terminal Company? *A.* I am Superintendent for the Portland Terminal Company.

Q. Does the Maine Central have any yard men—yard brakemen—in the Rigby yards? *A.* No, sir.

Q. Would the Maine Central Railroad, as a corporation, —a separate entity,—have anything to do with hiring yard brakemen in the Rigby yards? That is a separate corporation—Would the Maine Central have anything to do with hiring yard brakemen in the Rigby yards? *A.* No. I told you what we do with Mr. Strout, here,—for convenience.

Q. In other words, for convenience you are the Superintendent for the Maine Central and for the Portland Terminal Company. Is that right? *A.* I don't know. You will have to go somewhere else about that.

Q. For convenience, Strout is actually Yardmaster for the Maine Central, but he hires employees for the Portland Terminal Company . . . *A.* No. Mr. Strout is Trainmaster.

Q. Well, as Trainmaster for the Maine Central he, in fact, takes applications for employees for the Portland Terminal Company? *A.* Yes. At times.

MR. JANSEN: I think that is all.

THE COURT: All through on direct now? I would like to have it done at one time.

MR. HANSEN: I am all through, Your Honor, I think.

MR. MILLER: No questions.

[Witness excused.]

JOSEPH M. LIBBY, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. JANSEN): Your full name is what? *A.* Joseph M. Libby.

Q. How old are you? *A.* Thirty-two.

Q. Where do you live? *A.* South Portland, Maine. Thornton Heights.

Q. What is your present occupation? *A.* Yard brakeman and conductor.

Q. For whom do you work as yard brakeman and conductor? *A.* Portland Terminal Company.

Q. How long have you been with the Portland Terminal Company? *A.* Since April, 1937. Trackman and brakeman combined.

Q. You were employed by the Portland Terminal Company before you were employed as a yard brakeman? *A.* Yes.

Q. And how were you employed, before you were a yard brakeman? *A.* As a trackman.

Q. Maintenance-of-way employee? *A.* Yes.

Q. When did you start with the Portland Terminal Company as maintenance-of-way employee? *A.* My rating started April 15th, 1937, but I served before that. You had to accumulate six months in order to have your rating, so I was with them before that.

Q. You mean that before April of 193. you worked with them six months? *A.* Off and on. Yes.

Q. Off and on? *A.* Yes.

Q. When you were maintenance-of-way employee did you start getting paid by the Portland Terminal Company the minute you went down there and started work? A. Yes.

Q. When did you start braking? A. My rate started July 31, 1941. . . .

Q. When did you actually start in the yard braking? A. The following morning.

Q. July 31st . . . It would be August 1st. On the first job? A. Yes. The following morning. August 1st.

Q. August 1st, 1941? A. Yes.

Q. Now did you go right from maintenance-of-way work to braking? A. One day in between elapsed.

Q. And did you have to resign, or anything like that, from your maintenance of-way job? A. Yes.

Q. What did you do? Resign? A. Yes.

Q. And, after you resigned, you went on braking? A. Yes.

Q. And that was August 1st, 19 . . . A. That was . . . No. I had to put in two weeks striking.

Q. When you speak of your rating period you are talking about the time after your striking or training period? A. Yes.

THE COURT: When you speak of striking . . . A. I had to put in two weeks with the crew, striking. Learning the work.

THE COURT: You don't mean quit the job—striking on the job? A. No. It is a training period.

Q. They call them strikers or trainees? A. Yes.

Q. Well, when did you actually resign as maintenance-of-way man? Before your striking, or after? A. Before I did my striking.

Q. And then who did you talk to about going on as yard brakeman? A. I went out and saw Mr. Quincy.

Q. And what did Mr. Quincy tell you about it? A. Well, I heard . . .

Mr. Pierce: Just a minute. He asked you what Mr. Quincy told you. *A.* Mr. Quincy told me that he would hire me.

Q. Did he say anything about this training period? *A.* Yes.

Q. What did he say about that? *A.* That I had to train for two weeks.

Q. For two weeks? *A.* Yes.

Q. You had been working in the yards around there for four years? *A.* Five. That is, as section hand.

Q. You are pretty familiar with the yards? *A.* Most of them. Yes.

Q. Tracks and switches, and all of those things? *A.* In a majority of the yards. Yes.

Q. Then did they require you to take an eye test and a physical examination? *A.* Yes.

Q. And you did that? *A.* Yes.

Q. And did you sign these application forms we have been talking about? *A.* Yes.

Q. Then did they give you some kind of a form to report to a certain conductor? *A.* That's right.

Q. Do you remember who the conductor was? *A.* Mr. Pettis.

Q. Is he in the court-room? *A.* Yes.

Q. And you went out and reported to Mr. Pettis? *A.* Yes.

Q. After you reported to Mr. Pettis, what did he tell you to do? Tell us what Mr. Pettis told you to do. Did he tell you to stay with him, or go with someone else; or what? *A.* I don't know the exact words that took place, now. I was to be a trainee with the crew and learn the work, and he instructed me in safety and instructed me to stay with the head brakeman and learn the motions and the yard and the work in general.

Q. What time of day did you start? A. Six-thirty a.m.

Q. How long did you work during the day? A. Eight hours.

Q. And did you work each day during the two weeks? A. All but Sunday.

Q. You didn't work Sunday? A. The crew didn't work Sunday.

Q. What crew was that? A. Street job. Commercial Street job.

Q. You worked each day from six-thirty in the morning until when? A. Two-thirty in the afternoon.

Q. And you worked each of the days during the entire fourteen day period, except Sundays? A. Yes.

Q. Did you go home early any day? A. No.

Q. Did you put in the full eight hours every day? A. Yes.

Q. Did you have any talks . . .

THE COURT: What was the answer to that last question? A. Yes.

THE COURT: Speak up.

Q. You put in the full eight hours every day? A. Yes.

Q. Did you have any talks with the conductor during this striking period about going up to the head office before the fourteen days were up? A. What do you mean? I don't understand.

Q. Did the conductor send you up, with his signature, saying that you were OK, before the fourteen day period was up? A. Yes.

Q. Do you remember when that was? A. No.

Q. Was it at the end of a week, or ten days? Do you know approximately? Well, what happened? A. Well, I was told to finish out the fourteen days.

Q. Do you remember the kind of a form you had? Let me show you Plaintiff's Exhibit No. 5. I will ask you if that

is the kind of a form that you got from the conductor—from Pettis—when he told you to go up to Mr. Quincy's office? Did it look something like that *(indicating)*? *A.* Well, I believe—I don't know whether that is the same form or not, but it contains the same meaning, I think.

Q. And he sent you up to Quincy's office? *A.* Yes, I went up to Quincy.

Q. And he had signed this form similar to Plaintiff's 5? *A.* I believe so.

Q. And they sent you back, and told you that you had to finish out the fourteen days? *A.* Yes.

Q. Did you get any pay at all for the two weeks that you spent striking? *A.* No.

Q. What did you do the first day that you were on there, during this training period? Describe that to us. *A.* Of course I knew the crew very well, and I tried to help them do their work and regular duties as much as I could.

Q. Did you start right in the first day? *A.* Yes.

Q. What part of the train did you ride? *A.* I stayed with the head brakeman.

Q. And he stays . . . *A.* He stays near the engine. What we call "chases the engine."

Q. He is the man who you say chases the engine? *A.* Yes.

Q. And you stayed right with him during that entire training period? *A.* Yes.

Q. Now the first day that you were there, did you couple or uncouple any cars? *A.* Oh, yes; I did a lot of things.

Q. Did you throw any switches? *A.* Yes.

Q. Connect up steam hoses or air hoses . . . *A.* No. We didn't do it on that job.

Q. Why? *A.* We don't use the air much on the Street. I was showed how to do it, but we didn't have to do it.

Q. Did you do any signalling? *A.* Well, I did what I was shown.

Q. The first day you say you pitched right in? *A.* Yes. I was willing and I wanted to learn.

Q. And you did that right along through the entire fourteen-day period? *A.* Yes.

MR. PIERCE: Do you claim this is an adverse witness, or is this your witness?

THE COURT: Well, I am not so particular, perhaps, as some about leading questions. But it isn't so forceful or impressive with counsel testifying instead of the witness, of course. I have to take that into account.

MR. JANSEN: I'm sorry.

THE COURT: I don't care. It simply diminishes the weight of the evidence.

Q. Will you tell us what you did about riding or walking? Did you have to do any walking on the job? *A.* Oh, yes; you do a lot of walking.

Q. Where did you walk? You will have to describe that to us. *A.* You are on your feet most of the time, walking. Very, very little riding. Switching out the cars, and backing up and going ahead, and switching on a lead and walking around the yard.

Q. Will you describe whether there was any difference between the work . . . Was there any difference between the work you did during the striking period and the work you did as brakeman after the striking period was over? *A.* Well, it is the same kind of work. Of course, I was learning all the time; at the first of it.

Q. Can you tell us whether or not you did all of the various kinds of work while you were striking that you had to do later as a brakeman? *A.* I tried to do all of them that were required on that job.

Q. State whether or not, even after you went on the regular pay-roll, you continued to pick up a little learning

here and there? *A.* Oh, yes. You can always learn something.

Q. Do you have to take any kind of an examination with regard to the rules of the yard—signals or blocks or anything? *A.* I had to write the flagman's work out when I got through my training period.

Q. How did you do that? *A.* I went out to Rigby and he gave me the book, and I had to copy the answers—the questions were all typewritten out, and I had to copy the answers in out of the regular rule-book.

Q. Let's see. They gave you a book which contained the questions? *A.* Yes.

Q. And it was a matter of copying the answers? *A.* Yes.

Q. Did you have to learn anything from memory, for that examination? *A.* No, you don't have to learn anything.

Q. After the fourteen-day period was up, you went on the spare board—on the regular pay-roll? *A.* On the spare board. That is right.

Q. How was the weather when you were striking? *A.* Well, it was summertime. Hot. We had one rainy day.

Q. What did you do that day? *A.* I stayed right on the job.

Q. Did you ever quit early? *A.* No.

Q. Were you ever told that you could go home early? *A.* No.

Q. Did you ever . . . Were you ever told that you could come and go as you pleased while you were striking? *A.* No. No mention was made of coming or going.

Q. You stayed there from six-thirty to two-thirty? *A.* Yes.

Q. And, as far as you know, you were expected to? *A.* That is right.

Cross-Examination

X-Q. (Mr. Pierce): Where do you live? *A.* Thornton Heights, South Portland.

X-Q. Where did you come from, to South Portland? *A.* Scarboro.

X-Q. Did you go to school? *A.* Yes.

X-Q. Where did you go to school? *A.* Scarboro.

X-Q. Scarboro High School? *A.* Yes.

X-Q. And Scarboro High School, I suppose, used to start at a certain time in the morning? *A.* Yes.

X-Q. And let out at a certain time in the afternoon? *A.* Yes.

X-Q. And when you were there you showed up at that time and left at that time? *A.* I was four years in high school and never was absent, tardy or dismissed.

X-Q. And the teacher didn't let you go home early now and then? *A.* I didn't ask to.

X-Q. And when you were training to become a yard brakeman you showed up when the crew were starting in the morning? *A.* Yes.

X-Q. And you stayed there as long as the crew worked? *A.* Yes.

X-Q. Despite the fact that you had previously worked as track man? *A.* Yes.

X-Q. You hadn't learned all the work that was to be learned about the railroad business? *A.* No, you can always learn something every day.

X-Q. This was three years ago last summer? *A.* It will be four years this coming July.

X-Q. Do you recall the day when you were given by Mr. Pettis a card or letter telling you that you were qualified to go to work? Do you recall the date? *A.* No, I don't. It was during the fourteen-day period.

X-Q. Do you know how long it was prior to the end of the period? *A.* No, I don't.

X-Q. You don't know whether it was twelve or ten or seven days that were up? *A.* No, I don't.

X-Q. Do you know who you saw, down at the Yardmaster's office? *A.* It was a man that Mr. Johnson took his place. Maybe Mr. Johnson could tell you. That man isn't there now. I didn't talk with Mr. Quincy.

X-Q. The moment you completed your two weeks you went right on the board, you say? *A.* Yes. That same day.

X-Q. And the very next day you were assigned to actual work? *A.* Yes.

X-Q. So that apparently they were in need of men, or, at least they had use for men? *A.* Yes.

X-Q. When you were on the crew, were there any less men on the crew by reason of your being there? *A.* During my training period, do you mean?

X-Q. Yes? *A.* No.

X-Q. They were all out there? *A.* Yes.

X-Q. And they stayed the full period? *A.* Yes.

X-Q. Were they competent men? *A.* Oh, yes.

X-Q. They were competent to run the train if you hadn't been there, weren't they? *A.* Yes.

MR. PIERCE: That is all, Mr. Libby.

MR. JANSEN: Nothing further.

THE COURT: He may be excused.

[Witness excused.]

THE COURT: We will take a recess for ten minutes, here.

[Recess was then taken from 11:45 a.m. to 12:00 noon.]

AFTER RECESS

MR. JANSEN: I will call Mr. Carle.

KEITH R. CARLE, having been duly sworn, was examined and testified as follows:—

Direct Examination.

Q. (by MR. JANSEN): Will you state your full name? *A.* Keith R. Carle.

Q. Where do you live? *A.* 22 Norwood Street, Portland.

Q. How old are you? *A.* Forty years.

Q. How are you employed? *A.* Carpenter.

Q. Is that your trade? *A.* Yes, sir.

Q. Have you been with the Portland Terminal Company? Have you ever been with the Portland Terminal Company? *A.* Yes.

Q. Do you recall when that was? *A.* I can't tell you the exact date. No.

Q. Do you recall what month it was? *A.* I believe it was in January.

Q. What year? *A.* That would be '43-'44.

Q. '44? *A.* Yes.

Q. How long were you with the Portland Terminal Company? *A.* One day.

Q. What were you doing? *A.* I was acting as a trainee as a brakeman.

Q. Do you recall having the eye test and physical examination and all that has been testified to, and signing these forms that have been described? *A.* That is right.

Q. Do you recall the name of the conductor you were with? *A.* I don't. No, sir.

Q. How many men were on the crew that you were with? *A.* There were two men in the cab of the Diesel engine, and three men on the ground,—a conductor and trainee, and I was another trainee.

Q. And the two men in the cab of the Diesel engine—were they the fireman and engineer? *A.* They act as that.

Yes. They switch about, as engineers.

Q. Were there no regular yard brakemen on the crew? *A.* There was one regular conductor and—I believe—and the other man told me he was a trainee; he had been there a week or ten days.

Q. What did you do while you were there? *A.* He told me to watch his signals. He showed me how to operate the switches—watch and see how the signals were given.

Q. Did you do any of that? *A.* I did. Yes. He made his motion and I followed suit.

Q. What part of the train was he on, with reference to head end or tail end? *A.* Sometimes he would be near the engine, and sometimes there would be two or three cars on and he would be on the back end of it.

Q. What part of the terminal were you in? *A.* We were out in Rigby yard. I don't know what section that would be classified as.

Q. Was it handling cars . . . *A.* Yes. Making up freights for the larger engines.

Q. Did you do . . . Did you have anything to do with the switches yourself? *A.* I don't believe I operated a switch that day. No. He showed me how, but I didn't operate one.

Q. Did you have anything to do with coupling or uncoupling? *A.* No, sir.

Q. What time did you start in the morning? *A.* I believe I got out there about half past seven. There was no specified date given to me by Mr. Strout, the man who sent me out there, and I got out there about seven-thirty, I believe.

Q. How long did you stay? *A.* Two-thirty I came home.

Q. Was anything said to you about leaving early? *A.* No, sir.

Q. How was the weather that day? *A.* Very bad. It was snowing and raining.

Q. And you were out in the yard doing work? *A.* That is right.

Q. Did you go back again, after that day? *A.* No, sir.

Q. Did you ever get any pay for that day? *A.* No, sir.

Q. Did you ever go out and talk to any of the men on the railroad? *A.* I had some signal books and rules and regulations belonging to the Maine Central which I was told to return; and I went back and returned them to Mr. Strout at the office building on St. John Street. I asked him about a release and he told me to go out to Rigby. I went out to Rigby and I saw the clerk out there—I believe he is. He has a scar on his face where he has been injured on his face at some time.

Q. Did you talk with him? *A.* Yes.

Q. Did you talk to anybody else out there? *A.* That is all I did.

Q. What did you say to him, or he to you? *A.* I asked him about a release. Let's see. I first signed a paper stating that I wished to get through there—something like that. I asked him about a release and he said "No, you can't have a release. If you don't like that work, we have plenty of other work here for you to do." I, in turn, went to the Railroad Retirement Board. They, in turn, got to the War Man Power of the United States Employment Office, and they finally came to an agreement, after three days' consultation between the three, that I was not employed by the Portland Terminal Company,—or the Maine Central Railroad. I don't know. And that I didn't need a release to go on another job.

Q. But in the beginning they refused to give you a release? *A.* That is right. They did.

Q. And you never got any pay for the day that you worked? *A.* I never did. No.

Cross Examination

X-Q. (by MR. PIERCE): Do you remember the names of any of the men who were on parts of the crew of which you were a member that day? *A.* No, I don't.

X-Q. What did you call them? Did you have occasion to speak to them? Just by their first name, or what? *A.* I don't remember calling anybody that day by name. If I did I would have remembered it.

X-Q. You say there were two men in the cab? Two men in the cab? *A.* Yes. On the Diesel engine.

X-Q. Do you mean one of these rather small Diesels that the Portland Terminal Company uses for switching; or one of the great big Diesels that they use for hauling freight? *A.* This was a switching Diesel in there, I think.

X-Q. A switching Diesel? *A.* That is right.

X-Q. And you can't help me out as to the identity of any of the other men that you were with? *A.* No, I can't.

[Witness excused.]

THE WITNESS: Would I be able to go back to work now, Judge?

THE COURT: Yes, you can go back.

MR. PIERCE: Excuse me a minute. (conference). Just one other question.

THE COURT: Ask him from right there.

X-Q (by MR. PIERCE): When you spoke about a release, you mean a release so that you can seek employment somewhere else? *A.* That is perfectly right.

THE COURT: That is what I supposed he meant.

MR. PIERCE: All right. That is all.

[Witness Excused.]

WILLIAM J. COYNE, JR. having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. JANSEN): Will you state your full name, please? *A.* William James Coyne, Jr.

Q. Where do you live? *A.* 3 George Street, South Portland.

Q. How are you now employed? *A.* As yard conductor or yard brakeman.

Q. With what company? *A.* Portland Terminal Company.

Q. How long have you been with the Portland Terminal Company? *A.* Five years, February 9th, last.

Q. How old are you? *A.* Twenty-eight.

Q. What kind of work did you do before you worked for the Portland Terminal Company? *A.* I was a clerk in Shaw's.

Q. Do you recall when you started with the Portland Terminal Company? *A.* Striking?

Q. Yes. *A.* It was in the month of January.

Q. Do you recall signing an application or some other forms at the office, and taking the eye test and physical examination? *A.* Yes.

Q. Then were you assigned by the Company to some conductor? *A.* Yes.

Q. Do you remember his name? *A.* Fred Gleason.

Q. How long did you do this striking with Conductor Gleason? *A.* Fourteen days.

Q. How about Sundays? *A.* The job didn't work on Sundays.

Q. So you worked for a fourteen-day period, except for Sundays that may have intervened in the period? *A.* Yes.

Q. What time did you start? *A.* Eight o'clock in the morning.

Q. And how long did you work? *A.* It varied. Some days eight hours and sometimes ten.

Q. Do you remember what trick you were on? *A.* First trick.

Q. That starts when? *A.* Eight o'clock in the morning.

Q. And what part of the Terminal were you in? *A.* Yard 7; on Kennebec Street. Somerset Street.

Q. What kind of work was your crew doing? *A.* Industrial work.

Q. You say you worked some days eight hours and some days more? *A.* Yes.

Q. What was the longest day you were in the crew? *A.* About twelve hours.

Q. Did the conductor or any other member of the crew tell you you could go home after eight hours, or anything like that? *A.* No.

Q. How was the weather? *A.* That month was stormy weather, off and on. January was stormy. It varied.

Q. Were you out in the weather every day while you were doing the striking? *A.* Yes.

Q. Describe what you had to do? *A.* Well, the conductor told me to go with the head brakeman, and the head brakeman would, in turn, show me the motions and switches, and try to give signals—in other words help as I was learning. And if I didn't understand, just stand by a switch until I could—and once in a while I would intercede and help.

Q. Was it any different after a couple of days went by? *A.* Yes. After two days I began to learn the job of breaking in.

Q. Did you do anything different after two days? *A.* I might have got off and turned a switch and give a hand signal. The engine went along and you get off so as to be in sight of the other men of that crew.

Q. Was there any difference between what you did while you were striking and while you were regular? *A.* After you were on regular you were assigned the particular kind of job called head brakeman and you knew your duties. Follow it around. Throw the iron, and ride the engine, and . . .

Q. You did all of that after you were on regular? *A.* Yes.

Q. And you did the same thing before, except that you had someone with you? *A.* He did it part of the time. That was part of his duties. And once in a while I would intercede and throw the iron—for my own benefit.

Q. Were you required to be on your feet, or did you sit most of the time? *A.* You moved most of the time. When you went from one track to another you either rode on the engine or the cars or you walked to the switch.

Q. Did you get any pay at all for those days, except Sundays, during that fourteen-day period? *A.* No.

Q. How did you feel, after the first day or two, after you were on this job? *A.* Well, I felt pretty good. It was a new experience, and I liked the work itself.

Q. After you finished the day, did you feel that you had put in a day's work? *A.* Yes. Because it was a different line from the work I was doing. It was out-doors, and in my other line I had been indoors.

Cross Examination.

X-Q. (by Mr. Pierce): You say that before you went to the Portland Terminal Company you worked for Shaw? *A.* George C. Shaw.

X-Q. That is the grocery store? *A.* Yes, on Preble and Congress Streets.

X-Q. And you thought you would like to learn the railroad business? *A.* Yes.

X-Q. You didn't think, the day that you reported as

trainee, that you were competent to act as a railroad man, did you? *A.* The idea was I wanted to learn how to be a railroad man, because I had several friends—when I was working in the grocery business the railroad men would come in, and I talked to them, and asked them if they would let me know if there was anyone being hired. And at that time the railroad was in need of yard brakemen, and I went out and saw the person who told me all about it.

X-Q. And you started out in the railroad business, and you liked it? *A.* Yes.

X.Q. And you made good at it, apparently? *A.* I hope so.

X-Q. Now during that time how many other men were there in the crew? *A.* Three men, sir.

X-Q. The conductor— *A.* The conductor and two brakemen.

X-Q. I noticed when you stated what you were, you said you were a conductor *and* brakeman? *A.* Yes. That means qualified conductor and brakeman. I can cover three ends of the job; head-end, middle-man, flagman—or conductor.

X-Q. The conductor is the man who is in charge of the crew? *A.* Yes.

X-Q. And depending on how busy they are and the various seniorities, etc., depends upon whether you actually work as conductor or brakeman? *A.* Yes.

X-Q. If you are working as conductor you get more pay than you do as brakeman? *A.* Yes.

X-Q. And gradually, I assume, the older men, if they are competent, are the men who have the conductor's job? *A.* What?

X-Q. Gradually, as you stay on in the service and demonstrate your ability to do the work satisfactorily, you serve more and more as a conductor? *A.* Yes.

X-Q. And less as a brakeman? *A.* Yes.

Redirect Examination.

Q. (Mr. Jansen): Did you have to write in the rule-book, as Mr. Libby did? *A.* Yes, sir.

Q. Do you recall when you did that? *A.* The following night, after I had done my striking, there was a group of us went over to the Examiner's office and he gave us the papers and we copied it from one book to another.

Q. Into a sort of notebook affair? *A.* Yes.

Q. You didn't have to do anything from memory? *A.* No. it was all in the book.

Recross Examination

X-Q. (by Mr. Pierce): That is *after* you went on the board? *A.* No. That is just *before* I went on the board. The day before.

X-Q. In other words, to be sure that you read the book, they had you copy it? *A.* That is right.

[Witness excused.]

CHARLES E. MORGAN, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. TUELL): What is your full name? *A.* Charles E. Morgan.

Q. You are employed by whom? *A.* Portland Terminal Company.

Q. How long have you been with them? *A.* A little over three years.

Q. When you went there, where did you go to make your application? *A.* To Rigby.

Q. You went out to Rigby? *A.* Yes.

Q. And you signed one of the application forms? *A.* Yes.

Q. Then did you take a physical examination? *A.* Yes.

Q. And were you given a letter to a conductor? *A.* Yes.

Q. Do you recall what conductor you were sent to? A. James O'Neill.

Q. What yard was he stationed at? A. At Rigby.

Q. At Rigby? A. Yes.

Q. What time of day did you report to him? A. Eight o'clock in the morning.

Q. Eight o'clock in the morning? A. Yes.

Q. And you worked what shift? A. Until four.

Q. Eight o'clock in the morning until four in the afternoon? A. Yes.

Q. Did you work that regularly? A. Yes, sir.

Q. What did you do the first day, if you recall? A. Well, we were instructed to give motions—repeat the motions after the rest of the trainmen—and watch what they did...

Q. Yes? A. (*continued*):—and try to pick up as much of it as you could, yourself.

Q. Did you do any of the actual work, yourself? A. Later in the training period. Yes.

Q. How long would you say it was before you started doing some actual work? A. Perhaps three days.

Q. And then would you . . . what would you then start doing by yourself? A. Well, you would pull a few pins.

Q. And gradually did you begin to do more of the actual duties? A. Yes. The further you got along the more work you did.

Q. Well, did you do more? A. Well, that is the way they figured I could learn. By doing some of it.

Q. How long did you take your training period? A. Fourteen days.

Q. You worked from eight in the morning? Until... A. Until four in the afternoon.

Q. Was there any suggestion that you could leave earlier if you wished? A. Not that I recall. No.

Q. As far as you knew, you were expected to stay the entire time? *A.* We expected to work eight hours. Yes.

Q. After you completed your training period, did you take any kind of a written examination? *A.* We had to copy those answers out of that book on to that form they had there.

Q. You did that at what point in your training period? *A.* Right after the training period. Between the training period and the time you went on the board—or shortly after.

Q. Later on did you have a written examination? *A.* No.

Q. You didn't have an oral examination? *A.* No.

Q. You just wrote that into a book? *A.* That is all.

Cross Examination

X-Q. (by Mr. Pierce): As you went along through this training period, you became more familiar with the work? *A.* That is right, sir.

X-Q. And were able to do it better? *A.* Yes, sir.

X-Q. And, if I understood you correctly, as you went along through that period, the other members of the crew let you do more and more work? *A.* Yes. That is right.

X-Q. And at the end of the period you knew more about it than when you started? *A.* Yes.

X-Q. And I suppose you know more about it now than you did at the end of that period, don't you, Mr. Morgan? *A.* Yes, sir.

X-Q. How many other men were there with you? *A.* The conductor and the two brakemen.

[Witness excused.]

The Court: When you have finished with these men, I suppose they would like to know whether they are all through.

Mr. Jansen: Yes. You can leave now, Mr. Morgan.

HERMAN F. BERRICK, having been first duly sworn, was examined and testified as follows:—

Direct Examination

Q. (by MR. TUBELL): Will you state your full name? *A.* Herman F. Berrick.

Q. Where are you employed? *A.* Portland Terminal Company.

Q. How long have you been with them? *A.* Four years in August. *This* August.

Q. Where did you make your application for employment? *A.* Rigby Yard office.

Q. And you signed the usual aplication from? *A.* Yes, sir. Usual form.

Q. And took a physical examination? *A.* Yes, sir. And eye test.

Q. And you were given a letter to a conductor? *A.* Yes.

Q. What conductor were you sent to, or assigned to? *A.* Royal McIntire, at the East Yard, at Rigby.

Q. What time did you report to him? *A.* Seven a.m.

Q. When did you work? How long? *A.* Seven to three. First trick.

Q. Was that your regular schedule, each day? *A.* Yes.

Q. And did you work that entire schedule each day in your training period? *A.* We worked seven days, including Sundays.

Q. Including Sundays? *A.* Yes. The job worked Sunday, and I worked the full week out.

Q. Were you ever told that you weren't to work that full period? *A.* No.

Q. What did you do the first day when you started in? *A.* Well, Mr. McIntyre told me to watch the head man for motions, and if I got tired I could go into the engine and sit down. Keep watching for motions all the time.

Q. Did you do any work, yourself, the first day? *A.* No. Not the first time. I just watched and got the idea of the motions.

Q. How long before you did actual work, yourself? *A.* The fourth day. He let me throw switches and try to pull pins.

Q. How much did you do at that point? *A.* I didn't do very much. I watched the head brakeman mostly; to learn my motions a little better.

Q. By the time you finished your training period what were you doing in the way of work? *A.* I was doing what the head brakeman is supposed to do on the job.

Q. You did what the head brakeman is supposed to do? *A.* Yes.

Q. What would the head brakeman be doing while you were performing his duties? *A.* He puts the engine on from one track to another. Pulling pins and throwing certain switches.

Q. I think you said you finished your training period in seven days? *A.* No, Fourteen days. . . . . .

Q. Fourteen days, including Sundays? *A.* Yes.

Q. You worked seven days a week? *A.* Yes.

Q. At the end of your training period were you put on the spare board? *A.* After I wrote my book of rules, the next day I went on the board.

Q. Then did you have any oral examination? *A.* No. You don't get the oral examination until after you qualify for flagman.

Q. Did you get paid at all for the fourteen days that you put in for your training period? *A.* No.

MR. TUELL: That is all.

Cross Examination

X-Q. (by Mr. Pierce): You started out to qualify yourself for this job? *A.* Yes. I had all the intentions in the world of doing it.

X-Q. It never occurred to you to quit before the other fellows did, did it? *A.* No. Because I was anxious to learn. I wanted to go ahead.

[Witness excused.]

Maurice L. Carter, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (by Mr. Tuell). What is your full name? *A.* Maurice L. Carter.

Q. How old are you? *A.* Forty-three and a half.

Q. Where do you live? *A.* Saco, Maine.

Q. How long have you lived in Saco? *A.* Off and on, about all my life.

Q. How are you employed right now? *A.* Extractorman; Dame's Laundry.

Q. Did you ever work at the Portland Terminal Company? *A.* Yes.

Q. When was that? *A.* I couldn't say. I haven't got the exact date. A year ago this winter.

Q. A year ago this winter? *A.* Yes.

Q. How did you happen to go to the Portland Terminal Company? *A.* I was employed at that time at the Pepperell, and I couldn't stand under cover, and I saw the ad in the paper, so I answered it.

Q. You say you saw an ad in the paper? *A.* Yes.

Q. Mr. Carter, I am going to show you some issues of the Portland Evening Express; one for January 12, 1944, and another one for January 25, 1944. And I call your at-

tention—I call your particular attention to an ad which is signed by the Maine Central Railroad. Do you recall seeing either of those two ads? *A.* Mine was in the Sunday paper. I remember that, I think.

Q. Sunday paper? *A.* I think so. I wouldn't say for sure.

Q. Do you recall that the ad was signed by the Maine Central? *A.* Yes.

Q. And was it similar to these ads that you see here? *A.* The same thing. Yes.

Q. Look at the one of January twenty-fifth, and see if that is the same thing? *A.* I never noticed that one.

Q. But the other one, you say, is similar to the one you saw, and that is signed by the Maine Central? *A.* Yes.

Q. Did you go to the Maine Central Railroad? *A.* I went to the Railroad Retirement Board.

Q. And, from there, where did you go? *A.* Back to the railroad station.

Q. How did you happen to get from the Retirement Board to the railroad station? *A.* They sent me there.

Q. Who did you see at the railroad station? *A.* I don't remember his name.

Q. What office did you go to? *A.* 22½—

Q. 22½? *A.* I think so. I don't remember.

Q. Was there anything on the door? Any sign? *A.* I never noticed.

Q. You did talk to someone there? *A.* Yes.

Q. What did you do after talking with him? *A.* They sent me upstairs for an eye test.

Q. Did you sign any papers when you talked with this man at the depot? *A.* I don't remember, it has been so long.

Q. Did he speak to you at all about how long you would have to work and what you would get, or anything like that?

A. No. That wasn't mentioned at all.

Q. It wasn't mentioned? *A.* No.

Q. After your eye test and physical examination, did they give some kind of a form or letter to take to a conductor? *A.* Yes. A letter.

Q. Do you remember the name of the conductor? *A.* I was supposed to be under a conductor by the name of Paddy, but he was off sick a week and they put me under another conductor.

Q. Do you know whether that was "Paddy" or "Pettis"? *A.* They called him "Paddy".

Q. He was off sick? *A.* Yes.

Q. And you went under his substitute? *A.* Yes.

Q. How long did you stay there? *A.* I couldn't say.

Q. How many days? *A.* I should say right around seven days. Exactly, I couldn't be positive.

Q. What time did you start in the morning? *A.* Six-thirty, I think.

Q. What time did you get through in the afternoon? *A.* I think half past two or three.

Q. Did you have to ride in from Saco each day? *A.* Yes.

Q. And ride out again in the evening? *A.* Yes. Shipyard bus.

Q. Did you finish your training? *A.* No.

Q. Do you recall the circumstances at all, why you didn't finish? Tell us about that. *A.* Well, when that conductor Paddy came back he asked this other fellow about putting me on as head brakeman, and Paddy's substitute said I wasn't under pay—I was just a striker.

Q. Then what did you do? *A.* I finished the day and quit.

Q. Why did you quit? *A.* I thought if I wasn't going to get any pay I would go over to the Shipyard and get something.

Q. What did you do, during that seven days? *A.* I was under the head brakeman.

Q. Was someone with you? *A.* Just the head brakeman.

Q. What did you do? *A.* He told me to stay on the engine with the head brakeman and watch the signals, and every signal I saw him give I would do the same thing.

Q. What else? *A.* He showed me how to throw switches and pull pins.

Q. And did you do that? *A.* Yes.

Q. Did they ever tell you that you could go home early? *A.* No.

Q. Or that you could come to work late? *A.* No.

Q. Did they ever tell you when you started that you had to work out the full period in order to get paid? *A.* That never was mentioned.

Q. You had seen these ads in the paper? *A.* Yes.

Q. And when Paddy came back someone said "He is not on pay", and you thought, if you weren't getting paid, you might as well quit? *A.* That is the way I understood it.

Q. You never did get paid for the days you put in? *A.* No.

Cross Examination

X-Q. (by Mr. Pierce): Do you remember the name of the man you talked to at the railroad office? *A.* No, I don't.

X-Q. Do you remember what he looked like? *A.* No, I don't know. It has been over a year.

X-Q. You couldn't help us any in attempting to find that particular man you talked with? *A.* No, I don't think I could pick him out.

X-Q. You say nothing was said to you about pay at that time? *A.* No. Nothing said about money at all. I wasn't interested at that time whether I was going to get big or small money. All I was looking for was the work.

X-Q. What were you earning while you worked at the Pepperell? *A.* About thirty-two or thirty-three dollars a week.

X-Q. And you didn't make—in this conversation—you didn't inquire at all as to what you were going to get as starting pay? *A.* No. I considered my health was worth more than money.

X-Q. You didn't know whether you were going to get one dollar, or two dollars or three or four or five dollars a day . . . *A.* No. I wasn't interested as long as I could have my health. I knew if I went to work for them they wouldn't pay me as cheap as a dollar a day.

X-Q. But at the end of seven days, when you found you weren't going to get anything, you quit? *A.* That is right.

[Witness excused.]

MR. JANSEN: Now I would like to read into the record at least part of the advertisement relating to the men working in the Rigby Yard, which is operated by the Portland Terminal Company, and make an offer of proof. Have you any objection to that?

MR. PIERCE: Oh, yes. I don't object to the question of form . . .

THE COURT: The only way he can get his rights established is to make an offer of proof.

MR. PIERCE: I don't object to the question of form.

[Conference between Court and counsel at bench, off the record.]

MR. JANSEN: We offer to prove that the Maine Central Railroad Company, on behalf of the Portland Terminal Company, inserted an ad in the Portland Evening Express for the issues of January 12th and January 25th, 1944, which, among other things, contained the following statement:

"Railroads are seriously in need of men—at once—to keep necessary wartime transportation moving. It is an opportunity for men of all ages to get into railroad service—an essential industry and one that is most vital to the winning of the war. We want—for immediate employment—yard brakemen (yard trainmen) for Rigby Yards. Men hired immediately start a training period of ten days during which they do no actual work, but learn the yards and methods of work under trained supervisor. In this training period men are paid $4.00 per day. At the end of the training period they are immediately assigned to jobs and receive $1.067.5 per hour—" that is $1.06¾— "Minimum day, (8 hours) $8.54. Per hour overtime rate $1.60-1/4. This rate applies for all time worked over 8 hours. Yardmen are now practically earning as much ovetime as they elect to work, up to legal limit of 16 hours per day service."

And the ad is signed by the Maine Central Railroad. In the issue of January 25th, 1945, there appears the ad containing, among other things, the following statement:

"Immediate employment in permanent industry available at Maine Central Railroad. We need at once Yard Brakemen (Yard Trainmen) for work in Rigby Yards. Pay of $4.00 per day during training period. During training period men do no actual work but are instructed by experienced Yard Foremen. At end of training period men are immediately assigned to work. Pay when working is $8.54 per eight-hour day. Overtime per hour (rate for all time over 8 hours) $1.60¼. Yard Men are now practically earning as much overtime as they elect to work up to legal limit of 16 hours per day of service."

And that, also, is signed by the Maine Central Railroad.

MR. PIERCE: I can't remember the exact phraseology used by Mr. Jansen, but with reference to the first offer I think

he stated that he offered to prove that this, at the time it was issued . . .

THE COURT: He said in behalf of the Portland Terminal Company . . . that he would show that it is in behalf of the Portland Terminal Company.

MR. PIERCE: I haven't yet seen any evidence to warrant it.

MR. JANSEN: I expect to have to subpoena some of their officials.

HERBERT E. PICKERING, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (MR. JANSEN): Will you state your full name? *A.* Herbert E. Pickering.

Q. And where do you live? *A.* 122 Brackett Street, Portland.

Q. How old are you? *A.* Thirty-three.

Q. How are you employed? *A.* Now employed at the Portland Terminal Company.

Q. How long have you been with the Portland Terminal Company? *A.* Since February twenty-eighth, 1945.

Q. What kind of work do you do at the Portland Terminal Company? *A.* Yard Brakeman.

Q. Did you go through this so-called training period? *A.* Well, for five days.

Q. What is that? *A.* Five days.

Q. Five days? *A.* Yes.

Q. Do you recall when you started? *A.* I started at two-thirty in the afternoon, and worked until ten-thirty at night.

Q. Do you recall the name of the conductor that you worked under? *A.* I believe his name was Payne.

Q. P-a-y-n-e? *A.* Yes.

THE COURT: When did you say this was? How long ago? *A.* February 28th.

THE COURT: Of this year? *A.* Yes.

Q. Now, had you had any previous railroad experience? *A.* No.

Q. What kind of work had you done before that? *A.* Shipyard.

Q. Worked in the Shipyard? *A.* Yes.

Q. Do you recall the day you first went out during this training period? *A.* February 28th. Yes.

Q. How many men were there on the crew that day? *A.* Three.

Q. Including you? Or without you? *A.* I believe *with* me.

Q. With you? *A.* Yes.

Q. You mean there was the conductor and another brakeman and yourself? *A.* Yes.

Q. Which part of the train did you work on? *A.* Head end.

Q. Head end? *A.* Yes.

Q. Was there another head-man there—a Yard Brakeman. *A.* I don't believe so.

Q. You don't believe there was? *A.* No.

Q. Well, who did you work with the first day that you were there? *A.* Conductor Payne.

Q. Did he tell you what to do and how to do it? *A.* Yes. They showed me how to give signals—and I guess that is about all the first day. Just to give signals.

Q. And what happened the next day? *A.* The next day I gave signals and pulled a few pins.

Q. The next day were you still the only man on the head end? *A.* Yes.

Q. In fact during that entire five-day period . . . *A.* Five days I was head man. Yes.

Q. You say the next day you pulled pins? *A.* Yes.

Q. And what about the third day? *A.* I did the same thing.

Q. And the fourth and the fifth day? *A.* Same thing.

Q. Was there any difference between the kind of work you did during the five days you were in training and the work you did afterwards when you went on the board? Any difference at all in the work you did? *A.* Why, no. Not that I could see.

Q. You were the only head-end man? *A.* Yes.

Q. And after you got through with the training, you went on as a regular head-end man. Is that right? *A.* That is right.

Q. Did you get paid for the five days training? *A.* Yes.

Q. Do you recall how much you were paid? *A.* Four dollars a day.

Q. Were any deductions made from the four dollars? *A.* I couldn't say, right off.

Q. You don't remember that? *A.* I don't remember.

Cross Examination.

X-Q. (by Mr. Pierce): Now the day that you started as trainee was what date? *A.* February 28th.

X-Q. 1945? *A.* Yes.

X-Q. On the shift that started when? *A.* Two-thirty, p.m.

X-Q. And the conductor was a gentleman named Payne? *A.* Yes.

X-Q. Do you know what the name of the other brakeman was?

THE COURT: Did you know him by his first name? *A.* Fred.

X-Q. Had you ever worked on the railroad before? *A.* No.

X-Q. Could you start right out and do the work of a head brakeman? *A.* Well, the things he showed me to do—that is all.

X-Q. The things that who showed you to do? *A.* Mr. Payne.

X-Q. Mr. Payne? *A.* Yes.

X-Q. So that Mr. Payne during that time had to do his work and show you what to do? *A.* That is right.

Redirect Examiation

Q. (MR. JANSEN): Do you recall looking at your check stubs within the last few day, for that four dollars—when Mr. Bither was over to talk with you? I was wondering if I could refresh your recollection about the deductions? *A.* I don't seem to remember.

Q. You don't happen to have those check stubs with you? *A.* Not with me. No, I haven't.

[Excused.]

JOSEPH WALTER WIDOR, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (MR. JANSEN): Your full name is what? *A.* Joseph Walter Widor.

Q. And your address? *A.* 244 Douglass Street, Portland.

Q. How old are you? *A.* Twenty-five.

Q. How are you employed? *A.* Storekeeper, J. E. Gould.

Q. Did you ever do any work at the Portland Terminal Company? *A.* Last October. Two and a half days.

Q. Was that the so-called training period? *A.* Yes.

Q. October, 1944? *A.* Yes.

Q. Did you sign these applications and other things we have been talking about? *A.* Yes.

Q. Do you know the name of the conductor? *A.* Conductor Burbank.

Q. Burbank? *A.* Yes.

Q. How long did you work? *A.* Two days and a half.

Q. Do you recall the date that you started? *A.* On or about October sixteenth.

Q. How did you happen to work two and a half days? *A.* I had to quit, due to my knee. I have a bad knee. Jumping off and on the cars, it clicked on me and locked, and I had to quit.

Q. That was at the end of that two and a half days period? *A.* Yes.

Q. You had taken the physical and the eye test? *A.* Yes.

Q. Do you recall who you were assigned with when you first went on? *A.* Two and a half days with Conductor Burbank.

Q. Were you on the head end? *A.* No. The first day I followed Burbank and he showed me what to do and how to do it, and I had to repeat his motions. The second day I did a little more, and the third day I was there I was pulling pins and jumping off cars until I hurt my knee; and I told Mr. Burbank I was all through, and went up to the office and saw Mr. Johnson, and he talked to me a few minutes and I walked out; and that was all for that.

Q. Did you ever get paid? *A.* No.

Q. Did you have any talk or conversation about it? *A.* I was notified I was to get four dollars a day while training.

Q. How were you notified? *A.* I was told.

Q. Who told you? *A.* Mr. Strout and Mr. Johnson.

Q. Did you ask for it? *A.* No.

Q. Did they offer it to you? *A.* No.

Q. Did they say you would have to complete the training, or anything like that? *A.* No.

Q. Did you talk to them about pay at the end of two and a half days? *A.* No.

Q. But you never did get paid? *A.* I never did get paid. I never asked for it.

Q. What time did you start in the morning? *A.* Six-thirty to two-thirty.

Q. Did anybody ever tell you that you could leave early? *A.* No.

Q. Or come late? *A.* No.

Cross Examination.

X-Q. (by MR. PIERCE): When you started, you thought your knee would hold out? *A.* That is right.

X-Q. And you didn't have any intention of quitting the job you were trying to learn? *A.* No.

X-Q. You went in and did the best you could? *A.* That is right.

X-Q. And stayed with the boys as long as they worked? *A.* That is right.

X-Q. You wouldn't seriously have thought that the conductor would have thought much of you if you wanted to quit in the middle of the afternoon, would you? *A.* No.

[Witness excused.]

HOWARD L. CLARK, having been duly sworn, was examined and testified as follows:

Direct Examination.

Q. Will you state your full name? *A.* Howard L. Clark.

Q. Where do you live? *A.* 1577 Washington Avenue, Portland.

Q. Where do you work now? *A.* National Biscuit Company.

Q. Have you ever worked for the Portland Terminal Company? A. Yes.

Q. When was it? A. Last September.

Q. How long were you there? A. Six days.

Q. Did you sign these forms and take this eye test and physical that you have heard described here in court? A. Yes.

Q. Did you have any talk about pay or compensation at all? A. They said I was to receive four dollars a day.

Q. Who told you that? A. I believe it was . . . At the office on St. John Street.

Q. Did they tell you that you would have to complete your training? A. No.

Q. They just told you that you would get four dollars a day? A. Yes.

Q. Do you recall being sent out and assigned to a certain conductor? A. Yes.

Q. Do you remember his name? A. No, I don't remember.

Q. What did you do the first day? A. I went on with the head brakeman and followed his signals.

Q. And what else did you do? A. Well, that was all for the first day. I just went through the motions with the head brakeman.

Q. And on the second day what did you do? A. I pulled a few pins.

Q. And the third day? A. The same. And throwing switches.

Q. When did you get through or when did you quit or finish or stop doing that training? A. After my sixth day.

Q. What did you do then? A. I quit after six days.

Q. Did you see any of the officials of the railroad at all or talk to them about it? A. Yes. I went in after gasoline

to make my trip back and forth, and they told me I couldn't have no gasoline until I was through my training. So I couldn't do that. No gas, no work.

Q. When you got through with your training did you ever get your four dollars? *A.* No.

Q. Did you ever ask for it? *A.* Yes.

Q. Who did you ask? *A.* I don't know. I was up there in the office. They told me where to go. I went up and asked for my pay and they said they had no record of my being there.

Q. Did you talk to anybody else? *A.* No.

Q. In answer to your question they said they had no record of yohr being there? *A.* They had no record. No.

Q. You never did get paid? *A.* No.

Cross Examination.

X-Q. (by Mr. Pierce): Where do you live? *A.* 1377 Washington Avenue.

X-Q. Where were you working? At Rigby? *A.* Commercial Street.

X-Q. Oh, Commercial Street? *A.* Yes.

X-Q. And the reason you quit was because they couldn't or wouldn't give you extra gas .... *A.* They wouldn't give me gas to go back and forth to work with.

X-Q. That was the reason you quit? *A.* Not absolutely. No. I was in the Service and I have one club foot and I couldn't take it.

X-Q. You mean you couldn't physically do the sort of work these men have to do? *A.* Yes.

X-Q. So the reason you quit was sort of a combination of the two? *A.* Sort of a combination. Yes.

Redirect Examination

Q. (by Mr. Jansen): You found this— By the way, was it an injury you had in the Service? *A.* A club foot.

Q. And you found after six days that you couldn't continue to do the work? *A.* That is right.

Q. You had to jump up and down on and off the train? *A.* Yes, that is right.

[Witness excused.]

THE COURT: We will recess here until half past two this afternoon.

[Recess was then taken until 2:30 o'clock p.m.]

AFTERNOON SESSION.

The Court came in at two-thirty o'clock, p.m., and the taking of testimony proceeded as follows:

MR. JANSEN: May it please the Court, it is my understanding that the defendant does not dispute the fact that the advertisements which we referred to this morning were inserted by the Maine Central on behalf of the Portland Terminal Company.

MR. PIERCE: At least they were inserted with the knowledge of the Portland Terminal Company.

MR. JANSEN: And in its behalf? For their benefit?

MR. PIERCE: I don't know about their benefit. They were inserted with their full knowledge.

THE COURT: It doesn't make much difference. They may be admitted.

MR. PIERCE: As a matter of fact, Mr. Douglass whom I contacted is the senior executive of both companies, and he knew about the ads.

MR. JANSEN: I see.

ROBERT B. HANEY, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. JANSEN): Will you state your full name? *A.* Robert B. Haney.

Q. And where do you live? *A.* 74 Deering Street, City.

Q. How old are you? *A.* Nineteen.

Q. You are a son of Dr. Haney? *A.* Yes.

Q. Are you working at the present time? *A.* No. Going to school.

Q. What school? *A.* Portland High School.

Q. Did you ever work at the Portland Terminal Company? *A.* Yes.

Q. Do you recall when that was? *A.* I don't know the exact date. It was some time the latter part of November or the first of December.

Q. 1944? *A.* Yes.

Q. And how long—how may days—were you at the Portland Terminal Company? *A.* It was eight . . . No. It was either nine or ten. I am not sure which.

Q. Was that during a training period as a Yard Brakeman? *A.* Yes.

Q. And do you recall signing some application forms and taking an eye test and having a medical examination, such as have been testified about? *A.* Yes.

Q. Who paid for the medical examination? *A.* I did.

Q. Do you recall how much you paid? *A.* Two dollars.

Q. Your father didn't give you the examination, did he? *A.* No. He isn't allowed to.

Q. Do you recall being assigned to a conductor out in the yard? *A.* Yes. Mr. O'Neill.

Q. How long were you there? *A.* Either nine or ten days.

Q. Was anything ever said to you about the time you would come and time you would go? *A.* They told me to be there about eight, and I wasn't to leave until four in the afternoon.

Q. Who told you that? *A.* Well, my conductor.

Q. Your conductor told you that? *A.* I mean he didn't say particularly . . .

Q. Did you ever start to leave the job early or anything like that? *A.* No.

Q. To go to lunch? *A.* No.

Q. Do you recall that on one occasion that you left five minutes early to go to lunch? *A.* Yes.

Q. Will you tell us about that? *A.* My conductor just told me I hadn't ought to leave the job ahead of the time that the rest of the fellows did.

Q. Do you recall ever coming down late? *A.* Yes.

Q. Did anyone say anything to you about that? *A.* The fireman. He told me I ought to be there on time. I missed the bus and didn't get there on time.

Q. That was during this training period? *A.* Yes.

Q. Did you do any work while you were training? *A.* Yes.

Q. Describe in your own words what you did and how you progressed along through that training period? *A.* I was assigned to Mr. O'Neill and he started me to go with the man on the head end, which man had been there about six months; and he showed me the switches to pull and when to pull them, and so forth, and I was supposed to stick to him most of the time.

Q. Did you start right in doing all of the head-end man's work at the very beginning? *A.* He did a lot of it; and I was right with him and he told me when to do it.

Q. Did that change in any way, as your training period progressed through the days? *A.* Well, I did a little more each day.

Q. And, toward the end, what were you doing? *A.* Well, I was doing just about . . . well, I was right with the brakeman most of the time.

Q. Did you do all the things that the brakeman did? *A.* Yes.

Q. And were you there every day during that time? *A.* No, I was sick one day. And I didn't come in on a Sunday when they told me I should have.

Q. Who told you that? *A.* The fireman. My crew didn't work— The job I was on didn't work Sundays. But when I came in Monday the fireman told me I should have come in Sunday.

Q. And then at the end of that time did you get any pay for the period at all? *A.* No.

Q. Did you ask for it? *A.* I inquired about it. That was the agreement when I went in. If I didn't finish the period I didn't get paid. So I didn't ever expect any.

Q. How come that you didn't finish? *A.* I said I didn't want to railroad—laboring—and I went back to school.

Q. Was there anything about the work you didn't like? *A.* No. It was pretty cold. That was all.

Q. Were you out in the cold when you worked? *A.* Yes.

Q. Every day? *A.* Yes. Except the one I mentioned that I didn't go to work.

Q. One day when you were sick; and also a Sunday that you didn't show up? *A.* Yes.

Q. And they mentioned about that Sunday, the next day? *A.* Yes.

Cross Examination.

X-Q. (by Mr. Pierce): It was the fireman who told you that you should have come on Sunday? *A.* Yes.

X-Q. The fireman wasn't your boss? *A.* No.

X-Q. That was just a bit of advice he was giving you? *A.* Yes.

X-Q. From a man, to a young fellow whom he liked? *A.* Yes.

X-Q. The day that you were late and the conductor spoke to you was because you happened to miss the bus? *A.* Yes. Well, the conductor didn't speak to me about being late. It was the fireman.

X-Q. You wouldn't have thought of being late, yourself, except for the accident of missing the bus? *A.* Yes.

X-Q. If you were going to go any place to learn a job you would show up when the crew did? *A.* Yes.

X-Q. You would expect any sensible fellow to do that, wouldn't you? *A.* Yes.

X-Q. And you expected to, yourself? *A.* Yes.

Redirect Examination.

Q. (by MR. JANSEN): But it was the conductor who told you that you couldn't leave ahead of time for lunch? *A.* He didn't say I couldn't. He said I had better not.

[Witness excused.]

WILLIAM A. O'NEIL, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. JANSEN): Your full name is what? *A.* William A. O'Neil.

Q. How old are you? *A.* Fifty-eight.

Q. Are you employed at the Portland Terminal Company? *A.* Yes.

Q. What kind of a job have you got down there? *A.* Yard conductor.

Q. How long have you been with the Portland Terminal Company? *A.* Thirty-five years.

Q. How long have you been a yard conductor? *A.* Since 1912.

Q. During that period of time have you had occasion to have a number of trainees under you? *A.* Yes. Quite a few.

Q. Will you please describe, in your own way, how you go about instructing these trainees? *A.* Well, when they come to work the first day we give them a little advice and let them ride around in the engine and get used to the motion. Then when they feel they are secure we take them out on the ground and let the head-end man give them all the instructions he can—plus what I can give them, too.

Q. Do you have them do any work? *A.* Yes, sir. They start right in working.

Q. They start right in? *A.* Yes, sir.

Q. What are some of the things they do? *A.* The first thing, we try to get them to get the motions and get them right. And, if there are any switches to be thrown, get them to throw the switches. Break them in as good as we can.

Q. How about air hoses and steam hoses? *A.* We don't handle any steam hose.

Q. What trick are you on? *A.* Eight to four. The first trick.

Q. What part of the Terminal? *A.* All around. All over the Terminal.

Q. You say you don't handle steam hose? *A.* No. Just air hose. Not letting them go in between until they are there three or four days.

Q. But after that . . . *A.* Then we show them how to hook air hose.

Q. How about pulling pins? *A.* Not until after at least three days.

Q. How about after that? *A.* Then break them in pulling pins.

Q. How about dropping pins? *A.* Making couplings?

Q. Yes? *A.* We have automatic couplings.

Q. How soon can they do that? *A.* They can do that the

first day. We show them how to do it.

Q. When do these men starting during the day? *A.* They start when the crew starts at eight o'clock in the morning—on our job.

Q. When do they quit? *A.* At four o'clock, when we quit.

Q. Do you expect that every day . . . *A.* We expect them to be there from eight to four. Yes.

Q. Do you remember Mr. Haney, who just testified? *A.* I do. Yes.

Q. Do you recall supervising his training? *A.* I do. Yes, sir.

Q. Do you supervise these men while they are in training and watch what they are doing? *A.* All I can. Turn them over to the head-end man. And if there is any chance when we are working on lead jobs we take them up with us to show them what we are doing.

Q. And either you or the head-end man gives them their orders? *A.* Or the middle-man.

Q. Or the middle-man? *A.* Either one. Yes, sir.

Cross Examination.

X-Q. (by Mr. Pierce): Who is responsible, Mr. O'Neil, to determine when one of these trainees is competent to go on as a regular—I don't mean regular from the point of view of pay—but to become a yard man? *A.* The conductor on the job.

X-Q. And before the man goes . . . Strike that out. I show you Plaintiff's Exhibit 5, and I will ask you if you have seen documents similar to that? *A.* Yes, I have.

X-Q. And before the man reports to go on the board does the conductor sign one of these? *A.* Yes, the conductor signs and sends it in.

The Court: What does it say?

[Mr. Pierce reads Plaintiff's Exhibit 5 to the Court.]

MR. PIERCE: The blank apparently being to put in the word "No".

THE WITNESS: That is right.

X-Q. And at the bottom of that, will you read what is here? *A.* "I have been instructed by conductor——blank ——fully as above and understand." And then the trainee signs his name.

THE COURT: Unless that is filled out he wouldn't go on the board? *A.* They wouldn't accept him in the office unless that is filled out.

Q. In other words, practically speaking, and going back to the language of school, this is the certificate from the conductor, as examiner, that the student is— *A.* O.K.

X-Q. O.K.? *A.* Yes.

THE COURT: Strictly, it is his qualifications.

X-Q. Whether or not one of the things you attempt to look after is to see that the trainee will avoid unnecessary danger to himself? *A.* That is the first thing we tell them.

X-Q. And I assume that you try to see that he doesn't cause unnecessary danger to the other men in that crew? *A.* Yes, we have to do that.

X-Q. And also that he doesn't damage the property of the road or the shippers? *A.* That is right.

X-Q. In order to give adequate instruction to these young men, is it necessary, from their point of view, that they be around when the crew starts in the morning? *A.* Yes, sir.

X-Q. And if they are to complete their instruction work within a reasonable time is it advisable to have a man on the crew work . . . *A.* All the time when the crew is working.

X-Q. The crew on which a trainee is employed,—is that assigned to some particular duties? *A.* It is anything we are ordered to do in the Terminal.

X-Q. Is this a fair statement: That it does the same work which it would do if the trainee was not there? *A.* Yes.

X-Q. No more and no less? A. No more and no less. No, sir.

X-Q. Would it be in your judgment practical not to have these men throw switches and give signals? *A.* No. The man would never learn if he didn't. I would never turn him in unless I could see that he could throw a switch and give proper signals.

X-Q. Did you ever play baseball? *A.* Yes, many times.

X-Q. A man can't learn to play baseball out of a book or from watching a game? *A.* No, he can't.

Redirect Examination.

Q. (by MR. JANSEN): The best way they can learn is by doing things? *A.* By making them do the work. Yes.

Q. Do the number of days that the men have to be on training vary at all? *A.* I don't understand what you mean.

Q. I mean do some men work in training a longer period than others. Do you turn them in quicker in some cases? *A.* Some men have been turned in in three days. Others in five. And others in seven days. Others have gone two weeks. Most of the men I have went the full fourteen days.

Q. And then you turned them in? *A.* Yes.

Q. Did you turn them all in? *A.* I have turned every man that worked for me in. Yes.

Q. And you never turned anybody down? *A.* Except this man Haney.

Q. Well, he actually quit? *A.* Yes, he quit on me, and I had to turn his papers in as not being present.

Q. In other words, you never have had to recommend against any man working under you? *A.* No, I haven't.

Q. And you have been training employees for how many years? *A.* Oh, for a long while.

Recross Examination

X-Q. (by MR. PIERCE): Do you recall any other men in your experience that, for reasons of their own, haven't seen fit to complete the training period? *A.* Yes. There was one or two men—one or two other men—who came to work for us, and for some reason never showed up after the second day.

MR. PIERCE: That is all.

[Witness excused.]

LEON IRA BURBANK, having been first duly sworn was examined and testified as follows:

Direct Examination

Q. (by MR. TUELL): Will you state your full name? *A.* Leon Ira Burbank.

Q. Where do you live? *A.* 499 Main Street, South Portland.

Q. You are employed where? *A.* Portland Terminal Company.

Q. What is your employment there? *A.* Yard conductor, at the present time.

Q. How long have you been with the Company? *A.* I have been with them now since January 17th, 1917.

Q. 1917? *A.* Yes, sir.

Q. Have you been a conductor all of that time? *A.* No, sir.

Q. How long have you been a conductor? *A.* Off and on since January 19th, 1919, I believe the date was that I qualified.

Q. What yard are you working in at the present time? *A.* Rigby.

Q. Have you had various trainees under you, from time to time? *A.* Yes, sir.

Q. Do you know, or have you any idea, how many you have had? *A.* I don't know just how many, but I have had plenty of them.

Q. You have had plenty? *A.* I have had plenty. Yes.

Q. When they come to you for training do you instruct them as to what hours they are expected to be there? *A.* I do. Yes, sir.

Q. What do you tell them about that? *A.* On the job I am on now, I tell them they are expected to be there at six-thirty, and work until two-thirty. Those are our hours of work.

Q. What do you do? Tell us, as briefly and as fully as you can, what you have them do in the course of their training? *A.* The first day they come on I try and keep them with me and explain what the motions are and show them the motions we use and what the motions mean, and instruct them on keeping a safe clearance from the cars. As they go along and become more accustomed to the cars I show them how to give motions and throw switches and separate the cars and pull pins, so to speak; make couplings. As they go along and become more adept at the work, I go along with them and show them how to operate the brakes and how to couple hose, and show them the different places —if there are any close clearances—any switches that they have to watch out for in particular—I show them the places where they have to be particular about taking care of themselves.

Q. How soon do you actually get them started doing some of the things you show them how to do? *A.* The first day they stay with me, and I give the motions and explain to them and get them to give the motions. And the second day some men will seem to take hold and they will act as if

they wanted to get into it and they will go along and pull a pin.

Q. And each day do they do a little bit more of the actual work? *A.* As they go along and become accustomed to the surroundings and the work they take hold better; some faster than others.

Q. As they get near the end of their training period are they able to do just about as much as when they complete their training period and go on the spare board? *A.* Some of them. Some of them are able to do as well in six or seven days as others would be in ten to fourteen days. More so. According to the way the man takes hold.

Q. And, even after they are on the spare board, do you still have to supervise them to some extent? *A.* Well, there are things we all learn. I have been at it a long time and I learn things as I go along, now.

Q. Do you recall any instance where any of the trainees have had occasion to substitute or fill in for any regular member of the crew? *A.* I had one man under me; he worked with me either thirteen or fourteen days. And the next to the last day or the last day he worked for me they called a spare man for the job in the morning, and there was nobody came to me, and I went along expecting a spare man to show up. And it went along, and I went and asked for a spare man, and they said the man showed up, and I said "I didn't see any spare man." And they said to me, "What are you doing?" And I said, "This student is chasing the engine for me the best he can until I get somebody." Well it seems that the man they called for the job, he went to him—he went to my student—instead of coming to me. Instead of coming to me he went to him and he told him there was a crew there. The man went home and

called the crew dispatcher up, and the crew dispatcher told him to come down, which he did.

Q. So for a period of time that trainee was filling in as a crew man? *A.* For a short period of time, he did. He had been working with me long enough so he *should* have been capable of going along.

Q. Did you keep any record of the hours that these trainees work? *A.* My work has been from six-thirty to two-thirty for a number of years. They come to work with me in the morning when I go to work and they are there until we get through at two-thirty.

Cross Examination

X-Q. (Mr. Pierce): Let me understand about this instance that you spoke of. I didn't get it quite clear. You say that the spare man, who was sent in to you by the regular method that the Company has, came, and instead of reporting to you he saw—who? The trainee, did I understand you to say? *A.* The trainee that was on the engine.

X-Q. Yes. And the trainee told him there was a full crew? *A.* Yes. That is the idea.

X-Q. The trainee wasn't instructed by you to tell him anything like that? *A.* No, I didn't know anything about it until afterward.

X-Q. He happened to be pretty ambitious? *A.* He was one of those fellows who knew all the answers.

X-Q. That wasn't in accordance with any railroad practice that was authorized? *A.* No, sir.

X-Q. I am almost sixty—How old are you? *A.* If I live to the last day of August I will be fifty-five.

X-Q. There are a lot things I could learn about the law business, and there are lots of things you could learn about the railroad business? *A.* Yes. There are lots of things I don't know at all.

X-Q. When you certify that one of these trainees is fit to be put on the spare board, there are a lot of things for him to learn as he becomes more efficient? *A.* Yes, sir.

X-Q. Your certificate means that he is worth some money to the road and entitled to get paid? *A.* Yes.

X-Q. And if you should certify a man and he turned out to be no good, the blame would be upon whom? You? *A.* I don't think so. I give the man all the instructions I possibly can, and if he gets so he thinks he knows more than I do and disregards what instructions I give him and knows more than I do—I don't know what you would call it.

X-Q. What I mean is, when you certify a man it means that in your judgment he is a proper man to go to work? *A.* He should be.

X-Q. And to the best of your knowledge he *is*. Otherwise you wouldn't sign the certificate? *A.* That is right.

X-Q. From a practical point of view, would it work if these trainees were reporting at all times of the day, whenever they happen to get good and ready? *A.* No, sir.

X-Q. From *their* point of view would they get good instructions that way? *A.* I don't think they would.

Redirect Examination.

Q. (by MR. JANSEN): In this instance about the man who filled in for a while for a crew member; he had been working actually a little while before the spare man had reported? *A.* He had been with us. Yes.

Q. I mean on that particular day he had been working a little while before the spare man came. *A.* Just the same as he had been every day.

[Witness excused.]

NORMAN W. PETTIS, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (by Mr. Tuell): Your full name is what? A. Norman W. Pettis.

Q. Where do you live, Mr. Pettis? A. 175 High Street.

Q. Where are you employed? A. Portland Terminal Company.

Q. How long have you been with them? A. Thirty-nine years and six months.

Q. Thirty-nine years and six months? A. Yes.

Q. What is your present employment there? A. Yard conductor.

Q. What Yard are you working at? A. Yard Eight. On Commercial Street.

Q. In the course of your experience as a conductor with the Portland Terminal Company, have you had various trainees under you? A. A few.

Q. A few? A. Yes.

Q. Have you any idea how many? A. No.

Q. When they report to you, will you tell us as best you can how you conduct their training? A. Well, we keep them on the ground with us and instruct them to give motions and start them throwing switches.

Q. How soon do you start them doing some of those things? A. We don't allow them to pull any pins until three or four days.

Q. Is that the first thing they actually do? A. No. They give signals and throw switches.

Q. How soon do they begin doing that? A. The first day.

Q. And then, later, they begin to pull pins? A. Yes.

Q. And, as they go along, do you give them more and more actual work to do? A. Yes. As they improve we give them more work.

Q. And by the time they have reached the end of their

training period are they able to do quite a bit? *A.* Supposed to be.

Q. What are your hours? *A.* Six-thirty a.m., to two-thirty p.m.

Q. Do you expect your trainees to work the same hours? *A.* Yes.

Q. Do you give them the instructions on that point? *A.* I have never had any opportunity to do so. They have always showed up at six-thirty and went to work when the crew did and went home when the crew did.

Q. And you expected them to stay until the crew does go home? *A.* What?

Q. I say, you expect them to stay until the crew does go home? *A.* Yes.

Q. Do you recall having Mr. Libby on your crew back in 1941? *A.* Yes.

Q. Did he qualify quite rapidly, if you recall? *A.* Yes, he did. He worked on the section before he went to braking.

Q. How soon did you feel that he would have been qualified to go on the spare board? *A.* I don't remember how many days. I know I sent him to Rigby before his time was up.

Q. You have no idea how long that may have been? *A.* No.

Q. But, in any case, you did send him in before the fourteen days were up? A. Yes.

Q. And what happened? *A.* They sent him back to finish his time.

Q. Do you keep any records of the trainee's time at all? *A.* No, sir.

MR. TUELL: No further questions.

MR. PIERCE: I think the cross-examination of this witness would just be cumulative, Your Honor. I have no questions to ask the witness.

[Witness excused.]

MR. JANSEN: I guess that is all, Your Honor.

[Conference between counsel, off the record.]

MR. JANSEN: May it please the Court, I think counsel are agreed that the record may show that the 3¼ percent Railroad Retirement tax is deducted from the four dollars a day that is paid to the trainees who have completed the course.

MR. PIERCE: That deduction is made because of an understanding on the part of the Paymaster's Department that it is compelled by the Federal Tax Law.

MR. JANSEN: The plaintiff rests.

MR. PIERCE: Could we have just a minute, Your Honor.

THE COURT: Yes.

[Conference, off the record.]

PATRICK JOSEPH TRACEY, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (MR. PIERCE): Will you state your full name? *A.* Patrick Joseph Tracey.

Q. What is your position? *A.* Chief train crew dispatcher.

Q. What does the chief train crew dispatcher do? *A.* He keeps all the records of the men called on to the crews for the Portland Terminal Company.

Q. And were you so employed on February 28th, 1945? *A.* Yes, sir.

Q. I show you a page marked Defendant's Exhibit A, and ask you what that page is a record of? [Defendant's Exhibit A marked.] *A.* It is a record of all the crews on February 28, 1945.

Q. Does it show the record of a crew of which a conductor named Payne was the conductor? *A.* Yes, sir. Crew 23. Conductor Payne. W. H. Payne.

Q. Who else were members of that crew on that date? *A.* P. P. Conley and F. M. Small.

Q. Are Mr. Conley and Mr. Small yard brakemen? *A.* Yes.

Q. And regularly employed? *A.* Yes. Regular men.

MR. PIERCE: I offer this page—as I understand it, this book is in current use—

THE COURT: Can't you read enough into the record so it will be clear what it is?

MR. PIERCE: Defendant's Exhibit A is stated by the witness to be a page of his regular record which shows all the crews of the Portland Terminal Company for the twenty-eighth day of February, 1945. Listed under Number 23 are the names of W. H. Payne, P. P. Conley, and F. M. Small. And we offer that exhibit.

MR. JANSEN: No objection.

THE COURT: Admitted.

Q. Is the first name, of the three names that appear in each of these groups— *A.* That is the conductor.

Q. And the other two are yard brakemen? *A.* Yes.

Q. Does this record show anything about whether or not there were trainees on one of those crews? *A.* No. There is no record of trainees.

Cross Examination.

X-Q. (By MR. JENSEN): Do I understand that you don't keep any record of trainees that have worked? *A.* Not until they are turned in. The conductor has their slip that is given at the office when they go out as trainee. After they have completed their training the record goes on the board and the record is kept just the same as any other men. They are paid by separate voucher when they are on training.

X-Q. You mean when they have completed the training period? *A.* Yes.

X-Q. Paid on separate voucher? *A.* Yes.

X.Q. You keep no record of them at all? *A.* No. Sometimes they don't finish their training. They just drift away and we never see them again.

X-Q. This record you made in regard to Payne, Conley and Small,—is that made when the men are called? *A.* That is completed that day. If a man on a regular assignment is off, it shows on the outside, here *(indicating)*.

X.Q. You don't actually see the men report on the job, and then put their names on this book? *A.* No. If they are not on the job the conductor calls up when they are due to work and lets me know that they are not on the job.

X-Q. And then you call another man? *A.* Yes.

X-Q. And you put another man's name in red ink? *A.* Right here *(indicating)*. Not necessarily red. It just happens to be red there. If he is called on the job the record should check with the time slips.

X-Q. So, if the conductor never called and said one of his two brakemen were absent, you wouldn't have any occasion to call a spare man? *A.* That is right. All men report off through my office.

X-Q. If the conductor was satisfied to use a trainee instead of one of the regular brakemen, you would have no way of knowing? *A.* They don't do it without calling up the office for permission. They *do* do *that*. I have had men worked in the morning from seven to three and they reported them OK, and I was a man shy and put him on the board as a regular in the P.M. I have had men who were trainees in the A.M.

The Court: What were they in the P.M. *A.* Regular brakemen.

X.Q. If it was in the middle of their training would they go back to their training the next day? *A.* No. Once they are turned in they don't go back.

X-Q. The conductor's approval may not have been sent in— *A.* No. The conductor's approval has to come in before that is done.

X-Q. How could you put them in in the A.M. as trainee and P.M. as head-brakemen? *A.* The conductor would be on the job outside the office and send them in.

THE COURT: He would be converted into a brakeman? *A.* Yes, if he was turned in by the conductor.

THE COURT: And he would stay there? *A.* Yes.

THE COURT: Like the caterpillar and the moth; he couldn't go back.

Q. (by MR. PIERCE): The conductor would sign the slip recommending the man for employment? *A.* That slip has to come into the office first.

[Witness excused.]

JAMES L. QUINCY, having been first duly sworn was examined and testified as follows:

Direct Examination.

Q. (MR. MILLER): Will you state your full name? *A.* James L. Quincy.

Q. And your position? *A.* Assistant Superintendent, Portland Terminal Company.

Q. What are your duties? *A.* General supervision of the Portland Terminal Company employees.

Q. Do you have direct supervision over the yard crews of the Portland Terminal Company? *A.* Yes.

Q. Now, Mr. Quincy, you have heard the testimony during this entire hearing? *A.* Yes, sir.

Q. And you have heard Plaintiff's Exhibit 5 referred to? *A.* I have.

Q. What is it? What is Plaintiff's Exhibit No. 5? *A.* That is Portland Terminal Company's Examination Form Number 3.

Q. What is it used for? *A.* Used for a trainee when he completes his tour of duty and is turned in by the conductor.

Q. Turned in to whom? *A.* To my office.

Q. Did you hear Mr. Libby state he brought one of these papers to your office and then was returned to finish his training? *A.* If that was done it was done with no authority.

Q. What are instructions with reference to that? *A.* When the conductor gives us the slip and turns him in as all right, he has to go on the board.

Q. And he isn't permitted to go back and finish the fourteen days? *A.* That is right.

No cross-examination.

[Witness excused.]

HARRIS L. STROUT, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. MILLER): Will you state your full name? *A.* Harris L. Strout.

Q. And your positoin? *A.* Train Master, Maine Central Railroad.

Q. Are you a Portland Terminal Company officer or employee? *A.* Maine Central. I am not a Portland Terminal man.

Q. Whether or not it is true that you interview applicants for Portland Terminal Company jobs? *A.* It is true.

Q. How does that come about? *A.* Well, the reason for that is that men apply to the Retirement Board, or to our employment office at 242 St. John Street, in regard to positions as brakemen and trainmen, and they send them to my office to give them an eye test and also fill out an ap-

plication blank after I explain to them the nature of the work. Then they are sent to our Company Doctor—Dr. Charles Cragin, for a physical examination. If that is satisfactory they are instructed to report to Mr. Quincy's office in the general yard at Rigby.

Q. What papers, if any, do the applicants for Portland Terminal Company jobs sign in your office? *A.* He takes his eye test first, and if that is OK he signs, after it is filled out; giving the condition of his eyes.

Q. I show you Plaintiff's 2, and ask you whether that is a form filed in and signed in your office? *A.* That is the application that is filled in and signed in my office.

Q. And, in the second paragraph, I call your attention to applications for four different positions. What are those positions, please? *A.* The first is "Student privileges". If this man is a student or planning to be a student, and hasn't had any previous railroad experience as a trainsman, the other three are scratched out. If he has had experience, the top and two last ones are scratched out.

Q. Do you have any conversation with the applicant in respect of remuneration? *A.* I tell him that the period that he is a student, provided he works out his full student period, he will receive four dollars a day for ten or twelve days—whichever time it takes for him to complete the period.

Q. And if he doesn't work out that period? *A.* That doesn't apply.

Q. And is it your invariable practice to have such a conversation with these applicants? *A.* I always do. I try to give them the full story, and the nature of the work, and what is expected of them.

The Court: Do I understand if he isn't certified by the conductor he gets no pay at all? *A.* That is right. He has

to do his work so that the conductor is satisfied that he would be a proper man for the job.

THE COURT: If he is recommended for the position he gets pay for what time he has put in, but otherwise not? *A.* If the conductor recommends him as qualified to go on the board as spare brakeman, he is entitled to four dollars a day.

MR. JANSEN: No questions.

[Witness excused.]

JOHN F. JOHNSON, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (by MR. MILLER): Will you please state your full name? *A.* John F. Johnson.

Q. And your position? *A.* Chief Clerk to the Assistant Superintendent, Portland Terminal Company.

Q. That is, Chief Clerk to Mr. Quincy who has just testified? *A.* Yes.

Q. And where is your office located? *A.* Our office is located in the general yard office at Rigby.

Q. What do your duties consist of? *A.* My duties consist of supervising the work in the office, and interviewing new help that comes in looking for positions.

Q. Whether or not you interview all applicants for Portland Terminal Company yard jobs? *A.* No, sir.

Q. Do you interview some of them? *A.* Yes. Some of them.

Q. And do some of those applicants come to you in the first place? *A.* Some come in the first place as new men, and some come from Mr. Strout's office.

Q. In the case of an applicant who sees you first, what takes place? *A.* When they first come in I ask them if they

have had any railroad experience or not. If they have had railroad experience, why we send them over to Mr. Quigley's office to take an eye test and have a physical examination. After that they come back and they are put on the board to go to work, if experienced men. If they are not experienced, they are sent to Mr. Quigley's office for an eye test and also an examination, and when they come back, then, we put them on with a regular crew as a student.

Q. You have heard all the testimony in this hearing? *A.* Not all of it. No.

Q. Well, in your office, what papers do you require these applicants to sign, Mr. Johnson? The inexperienced applicants? *A.* They fill out the regular application—

Q. That is, Plaintiff's Exhibit No. 2 *(indicating)*? *A.* Yes, sir. They fill out this application.

Q. And what else? *A.* And they fill out a form that asks if they belong to the Communist party or a German-American bund. They also fill out a form to show where they worked the last sixty days. And they fill out another questionnaire that shows when they were born and if they are married or single, if they have any children, what their status is in the draft, and also they fill out a form that takes care of the income tax, and another form that goes to the Government that shows where they were born; I believe that is for the Railroad Retirement Act.

Q. Whether or not they sign a form similar to Plaintiff's Exhibit 3, which I show you? *A.* Yes, sir. They sign this form, too.

Q. Whether or not you have any conversation with these applicants in respect of remuneration? *A.* We tell these new men that they will be paid four dollars per day, provided they stay and go to work.

Q. And do—

THE COURT: What do you mean by "stay and go to work"? *A.* I mean that they finish their training period and they go on the board to go to work as regular trainmen.

THE COURT: Provided they are recommended? *A.* Yes. Provided they are turned in by the regular yard conductor.

THE COURT: Is that the arrangement in all cases? *A.* Yes. As far as I know they are all told.

THE COURT: That is the regular routine? *A.* Yes. That they will be paid four dollars a day if they stay and go to work.

Q. Were you Mr. Quincy's Chief Clerk prior to October, 1943. *A.* I believe I went to work for Mr. Quincy the last of March or the first of April, in '43.

Q. Prior to October, 1943, what did you tell these men about remuneration? *A.* They didn't receive any pay for their training period prior to October 1st.

MR. MILLER: That is all.

Coss Examination.

X-Q. (by MR. JANSEN): If I understand you correctly, Mr. Johnson, you tell these trainees that if they go to work they will get four dollars a day for the training period?

THE COURT: He says if they go to work later on.

X-Q. Can you tell me a little more in detail the exact words. Suppose I was a trainee, what would you tell me? *A.* Well, I would tell you that you would be paid four dollars a day while you was a trainee, provided you stayed and went to work. If you didn't stay and go to work you would receive no pay.

X-Q. Suppose I said, "What do you mean by 'go to work'?" *A.* Well, I tell them that that would be *after* their training period.

X-Q. I see. I expect you have had men who didn't finish their training period? *A.* Yes, sir.

X-Q. Have you ever had any that the conductor refused to approve? *A.* Yes. One, I think.

X-Q. Just one? *A.* That is all I remember.

X-Q. What happened to him? Did he stay on a little longer, or what? *A.* I believe he stayed on one crew for—I don't know whether it was twelve or fourteen days; and I went to Mr. Quincy about him. I thought he was on kind of long. And Mr. Quincy took it up with the conductor that he was working with and put him up on another job and tested him out.

X-Q. Then what happened? *A.* They had to let him go, because he couldn't do the work.

X-Q. Did you pay him? *A.* Not that I know of.

X-Q. Otherwise, all the men who finished out training were approved by the conductor? *A.* Yes.

X-Q. And those who didn't finish out the training were not paid at all? *A.* I couldn't say about that. I don't have anything to do with that.

X-Q. Do you have anything to do with the records? *A.* Well, just as the conductor turns in the slips. We attach that record to the application. After the man is qualified and put on the board they send it to Mr. Thomas's office.

X-Q. That is the only record you have of the man? On his hours worked, or the number of hours worked in a day or in a week, you have no record of that at all? *A.* We keep no records of the trainees at all.

X-Q. How much time did this man you are talking about, altogether, if you can remember, put in at the railroad before they finally let him go without paying him anything? Altogether, how much time did he put in? *A.* I couldn't say, exactly. Probably fourteen days. I would not be sure of that.

X-Q. Fourteen days? *A.* Possibly. I wouldn't be sure.

X-Q. Eight hours a day, as far as you know? *A.* As far as I know he worked with the crew eight hours a day.

X.Q. You don't remember his name? *A.* No, I don't, off-hand, remember what his name was.

MR. JANSEN: No further questions.

[Witness excused.]

PERLEY N. DYKEMAN, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (by MR. MILLER): Will you state your full name and your position? *A.* Perley N. Dykeman. Conductor. Portland Terminal Company.

Q. How long have you been a railroad employee? *A.* Since August 13th, 1913.

Q. And how long a conductor for the Portland Terminal Company? *A.* I couldn't say, off-hand.

Q. Well, approximately how many years? *A.* Probably twenty-five years.

Q. Does a part of your duties consist of the instructing of so-called trainees? *A.* Yes.

Q. And have you instructed such men in the past? *A.* Yes.

Q. About how many? *A.* I don't know, exactly. Probably ten to fifteen. More or less.

Q. Under what circumstances do you first see such a trainee? *A.* Well, the trainee shows up at a designated place that I am, and he presents me with his papers and tells me he is sent in to be a trainee with me on the job. I open his papers and see what his name is and introduce him to my two brakemen. Then I tell him that I will put him with the head-end man who will instruct him to the best of his ability; and we instruct him as we go along, as we have time to do so.

Q. Whether or not his instruction consists both of observation and doing some acts? *A.* Observation, first.

Q. And, after a while, he gets so he does some things himself? *A.* He does.

Q. Whether or not he does those things in the presence of a member of the regular crew? *A.* Yes. In the presence of a member of the regular crew.

Q. Whether or not the trainee at any time while he is training, takes the place of any one of the regular crew? *A.* He does not.

Q. I understand there is always present a regular crew— *A.* A regular crew member. Yes.

Q. And you instruct the trainee with reference to his own safety? *A.* That is the first thing we tell him. To be careful of himself at all times.

Q. One of the acts is pulling pins? *A.* Yes. Pulling pins and throwing switches.

Q. And, while he is pulling pins, is one of the regular crew standing there watching him? *A.* Yes.

Q. In your opinion does the presence of the trainee, or the acts he does, speed up the work any? *A.* No.

Q. Why not? *A.* Because you have to keep him under observation at all times.

Q. Have you ever been a trainee, Mr. Dykeman? *A.* Yes.

Q. Did you get paid for the time you spent training? *A.* No.

Q. Did you think you should have been paid for that time? *A.* No. Not at that time.

Q. Why not? *A.* Because it was my ambition to be a brakeman.

Q. Why didn't you think you should get paid for the time you spent training? *A.* Well, it wasn't done in those days.

Q. Did you consider that you were working for the Company while you were training? A. No.

Cross Examination

Q.X. (by Mr. Jansen): How long ago was it that you were training? A. Oh, that was way back in 1913.

X-Q. How many weeks did you have to train? A. Two weeks.

X-Q. Where did you take your training? A. Right here in the Portland Terminal Company yard.

X-Q. Do trainees work full shift under you, when you have them? A. Yes.

X-Q. Do they start when you do? A. Yes.

X-Q. Do they quit when you do? A. Yes.

X-Q. And do you find that they must do the work with the rest of the crew—that they must do the work that he rest of the crew do—in order to learn it? A. Yes.

X-Q. You find that they learn best by actually performing the work? A. Yes.

X-Q. You found when you were training, I suppose, that you learned faster by actually doing the work? A. Very much so.

X-Q. What is the average time—the average length of time—required to train an employee; according to your method and experience? A. That depends upon the man's ability. The young man will pick up the business much quicker than an older man.

X-Q. What is the average? A. The average is—I keep them around five or six or seven days. Once in a while I keep them longer.

X-Q. Do you keep them as much as ten days? A. I think I kept one man eleven days.

X.Q. Did you ever turn any man down? A. No.

X-Q. You have passed all the men who trained under you? A. I passed them all.

THE COURT: These men do nothing except under supervision? *A.* That is all. I supervise, or one of the regular crew.

X-Q. Let me understand a little more clearly. There is only one man who can throw a switch? *A.* Yes.

X-Q. And when the trainee throws the switch the other crew man stands watching him? *A.* Yes.

X-Q. And that is true with reference to couplings? *A.* Yes.

X-Q. Sometimes the regular crew member might be right close at hand—a few feet; and another time he might be thirty to forty feet away? *A.* Yes.

X-Q. Sometimes you might let the trainee take the engine into a place and pull out a car while you watch him; and another time a regular crew man might go along with him? *A.* Most generally the regular crew man is with him at all times.

X-Q. But there are times he goes in without that fellow— *A.* No.

X-Q. Under your practice, in your experience, you haven't done that? *A.* No. In my experience he has always had a man with him.

X-Q. He might be on one side of the car and the regular crew man on the other side? *A.* No. There is only one side you can work on. On the engineer's side.

X-Q. How about when the clearance is pretty bad? Then you work on the fireman's side? *A.* Yes, but all crew members are on the fireman's side.

X-Q. The trainee may be close to the engine, and the head-end man may be a little further away, on the turn, and the middle-man may be even farther, and they are all relaying signals one to the other? *A.* That would depend on circumstances.

X-Q. That has happened? A. It might, once in a while.

Redirect Examination

Q. by Mr. Miller): Is the trainee ever subjected to any discipline for breaking rules? A. No.

Q. Why not? A. Because he isn't an employee.

Q. Are there any rules applicable to him? A. No.

Recross Examination

Q.X. (by Mr. Jansen): What did you mean by that? When you say a trainee isn't subjected to any discipline? A. Because he isn't.

X-Q. What do you mean by discipline? A. Well, if a man makes a mistake or anything, and you go along and tune him out for it; bawl him out for it.

X.Q. You don't bawl out the trainee? A. No.

X-Q. What other ways of disciplining do you have? A. I don't have no disciplining of trainees.

X-Q. Well, of disciplining the regular crew members, that counsel is trying to distinguish— A. I don't have no occasion to use those methods.

X-Q. What I am getting at is, Mr. Miller asked you if they were subjected to any discipline and you said no. I want to understand what you meant by "discipline." You mean you don't bawl them out? A. That is right.

X-Q. That is all you mean? A. I wouldn't say anything to a trainee if he made a mistake.

X-Q. Because he is a new man? A. Yes.

X-Q. And after he went on the spare board, you would be pretty slow to bawl him out, wouldn't you? A. Sure.

X-Q. In fact, it is the old-timers that should know about it that you bawl out, isn't it? A. That is right.

[Witness excused.]

Mr. Miller: The defendant rests.

THE COURT: Well, what do you want to do about briefs? The plaintiff has submitted a brief.

MR. PIERCE: Yes, Mr. Jansen very courteously furnished us a copy of it, but I was in Boston yesterday in the Circuit Court of Appeals and haven't had a chance to read it yet.

THE COURT: No doubt it is a very fine brief.

MR. PIERCE: It looks to me as if it was an extremely good brief. It seems to me that the facts in this matter are not particularly in dispute—

THE COURT: I guess you had better submit some memorandum of law authorities.

MR. PIERCE: I don't assume that the Government is interested in some particular instance; I assume that the Government is interested in the practice, so-to-speak.

MR. JANSEN: Yes.

[Conference, off the record.]

MR. JANSEN: I might suggest, if it please the Court, that we could stand on the brief as it is submitted now, and let counsel for the defendant submit a brief, and then we would submit a supplemental brief discussing the facts, rather than file a brief now and another brief later.

MR. PIERCE: I assume that would be a good suggestion, and as soon as Mr. Hooper can transcribe the record we will prepare a brief and furnish copies to counsel and to the Court. And I will promise to be diligent, but I would like not to have any set period fixed, if that is all right.

THE COURT: Well, do it as soon as you can, within a reasonable time.

MR. JANSEN: I would like to have an outside limit.

THE COURT: I assume that would be within three of four weeks.

MR. PIERCE: Could we make it thirty days?

THE COURT: Couldn't you make it three weeks?

MR. PIERCE: Three weeks after we get the transcript?

THE COURT: Yes.

MR. JANSEN: All right. And we will submit ours within fifteen days after receiving copies of yours.

THE COURT: Then we will adjourn.

(The taking of testimony and proceedings was then, at 3:45 o'clock, p.m., Eastern War Time, concluded.)

CERTIFICATE

I certify that the foregoing is a correct transcript of my shorthand notes taken at the time and place and in the matter therein referred to.

O.D.HOOPER,
Shortland Reporter, U. S. Courts.

Portland, Maine, 13th April, 1945.

PLAINTIFF'S EXHIBIT NO. 3.

PORTLAND TERMINAL COMPANY
TRAINMEN'S EXAMINATION—Form No. 1

..... 19....

.....

.....

Dear Sir:

Having filed application with Portland Terminal Company for position as Yard Brakeman, and successfully passed tests as to vision and hearing, and being of required weight and height, it is agreed by me to serve for at least two weeks under instructions of a Conductor for the purpose of learning the duties and qualifying for such position, employment to be subject of passing required examinations on the Operating Rules, the working rules and regulations as from time to time applied, and the approval of the designated officer.

Yours truly,

.....

PLAINTIFF'S EXHIBIT NO. 4.

PORTLAND TERMINAL COMPANY
TRAINMEN'S EXAMINATION—Form No. 2

..... 19....

.....

Conductor.

Dear Sir:

The Bearer ..... is reporting to you to learn the duties of Yard Brakeman.

Please see that he is thoroughly instructed, particularly in regard to flagging, receiving and communicating signals, block signal operation, handling switches, and overhead and side clearances.

Please keep him with you for two weeks, and at the end of that time fill out attached blank, Form No. 3, and return to me.

Yours truly,

.....

Superintendent.

PLAINTIFF'S EXHIBIT NO. 5.

PORTLAND TERMINAL COMPANY
TRAINMEN'S EXAMINATION—Form No. 3
(October 31, 1942)

(Mr. J. L. Quincy)

.....

Dear Sir:

Mr. (Leo E. Cyr) has worked under my instructions as to the duties of Yard Brakeman on dates as follows: (Oct. 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31).

I have instructed him as ordered relative to the duties of a Yard Brakeman, particularly in regard to flagging, receiving and communicating signals, block signal operation, handling switches, and have cautioned him in regard to looking out for overhead and side clearances.

I would .... recommend him for the position of Yard Brakeman.

Yours truly,

(AMBROSE MCMILLAN),
Conductor.

I have been instructed by Conductor (McMillan) fully as above and understand.

(LEO E. CYR).

PLAINTIFF'S EXHIBIT NO. 6.

MAINE CENTRAL RAILROAD COMPANY
PORTLAND TERMINAL COMPANY

Portland, Maine.
(Jan. 4, 1943)

Report of Reviewing Board of the Portland Division and Portland Terminal Company on application of (Leo Ernest Cyr), who is an applicant for employment as (yard brakeman) at (Rigby-Portland).

This above applicant has been before the Board for final inspection and we find him (or her) acceptable for employment.

(F. O. WOOD)
(H. J. KENNEDY)
(H. R. WITHEE)

(M. F. Rolfe) For approval (FOW)
Approved (M. F. Rolfe), *Assistant to General Manager.*

PLAINTIFF'S EXHIBIT NO. 7.

MAINE CENTRAL RAILROAD COMPANY
PORTLAND TERMINAL COMPANY

Portland, Maine.
October 1, 1943.

Mr. W. E. Easler, General Chairman,
Brotherhood of Railroad Trainmen,
91 Kelsey Street, South Portland, Maine.

Dear Sir:

Our talk of September 28th—

Effective October 1, 1943, and for the duration of the present Emergency, Student Brakemen, Road or Yard, will be made an allowance of $4.00 per day, for each calendar day, with a maximum number of ten days, irrespective of the hours devoted or the miles made on any day, the Student to devote not less than eight (8) hours each day to the service.

Payment to be made if and when the Student has qualified, is accepted for and takes employment.

If this arrangement meets with your approval, will you please so acknowledge on the second copy of this letter, which is attached.

Very truly yours,

(sgd) M. F. ROLFE,
Assistant to General Manager.

Acknowledged:

W. E. EASLER (s)
General Chairman, Brotherhood of Railroad Trainmen.

PLAINTIFF'S EXHIBIT NO. 8.

Yard Brakemen Employed by Portland Terminal Co. Jan. 1, 1942, to Mar. 20, 1945. Not now in service.

1942

Baird, Martin William
Brackett, Percy W.
Connolly, John P.
Cyr, Leo Ernest
Daniels, Kenneth M.
Doiron, William J., Jr.
Donnelly, William H., Jr.
Faye, Stanley Roland
Foster, Norman J.
Giberson, Donald A.
Hayes, James
Dearborn, Joseph J., Jr.
Jordan, Edward F., Jr.
Lee, James W.
London, Harold G.
McCaffrey, Charles H.
Molbeck, Albert C.
Morrison, Benjamin H.
Mosley, Carroll A. L.
Schoen, Herman J.
Smith, Merle S.
Viens, Thomas W.

Jan. 1, 1943, to Sept. 30, 1943

Anderson, Cornelius Tarbox
Bellis, Charles Edward
Brown, Myrl Webster
Clement, John Alfred
Dimond, James E.
Dube, O'Nues Geo. Donatuse
Guest, James A.
Gagne, Lawrence L.
Hamilton, George F.
Hendrick, Leslie J.
Hillman, John H.
Howard, Fred G.
Leclerc, Cyril Wilfred
Leighton, Eugene H.
Leighton, Justin S.
Lester, James B.
MacDonald, Charles F.
Marsh, John W.
McKinney, Fred W.
Michaud, Philip J.
Miller, Lee Roy
Moffatt, Ralph J.
Noyes, Kingman P.
Putnam, Cecil I.
Quimby, George G.
Reed, Hollis B.
Richardson, Austin R.
Russell, Alton R.
Snow, Roy E.

Oct. 1, 1943, to Dec. 31, 1943

Andrews, John F.
Creeden, John D
Dudley, Chas. W.
Gray, Noel Caleb
Howison, Mark A.
McEachearn, James G.
Moores, William T.
Mutch, Morris A.
Smith, Christian P.
Snyder, William H.
Townsend, Clarence W.
White, Adrian H.
Wright, Kenneth L.

1944

Alden, Ernest Henry
Beane, Fred W.
Boure, John N.
Bowser, Joseph C.
Bursis, LeRoy, Jr.
Donavan, Edward J.
Englehardt, Fred L.
Flink, Oscar B.
Fuller, Girard O
Hanning, William A.
Hanson, Clyde C.
Hayes, Arthur H.
Holt, William B.
Jordan, Robert Clinton
Lane, Amos O.
LaValley, Edward Henry
Lecerte, Wilfred T.
Masse, Joseph E.
McCoy, George M.
Mongeau, Gordon K.
Oldham, Roy E.
Parker, Charles M.
Parker, Thomas E.
Perrow, Leon Theodore
Sansone, Anthony J.
Sherwood, Waldo F.
Sullivan, Donald E.
Sullivan, Francis
Taylor, Sherman L.
Theriault, Donald A.
Tompkins, S. M
Towne, Wendell C.
Walden, Courtney A.
Ward, Benjamin L.
Wilbur, Charles D.
Wilson, Stanley H.

1945

Stevens, Kenneth W.

PLAINTIFF'S EXHIBIT NO. 9.

Yard Brakemen Employed by Portland Terminal Company
Jan. 1, 1942, to Mar. 20, 1945. Now in service.

1942

Thomas, Oramel S.
Conner, Russell H.
Finney, Joseph W.
Oates, Thomas E., Jr.
Botsford, Charles C
Kimball, Norman W.
Smith, Clarence H.

1943

Barnes, Charles
Giacullo, Angelo L.
Judd, Albert W.
Pryor, George E.
Duncan, Arthur R.
Dinsmore, Walter F.
Thompson, Bennett E.
Presnell, Robert G., Jr.
Yula, Rudolph S.
Sawyer, Urban L.
Johnson, Richard J.

1944

Currier, S. L.
Seavey, Linwood O.
Noble, James E.
Inman, I. H.
McKeen, Norman B.
Hunter, Hartford N.
Smith, Walter G.
Bouffard, Joseph A.
Foley, Robert W.
Foss, Samuel W
Newcomb, Geo. E.
Redlon, William F.
Hayes, Stanley B.
Lord, Daniel J.
Plummer, Cecil H.
Anderson, James W.
Wallace, Richard J.
McCordie, Wilmot N.
Huff, Frank N.
Rollinson, James T.
Carroll, Joseph T.
Landry, Harry P.
McCalmon, Irving F.
Oakes, John G.

1945

Herron, James F.
Gilman, Rene
Desmond, William F.
McMahon, Henry E.

Bernier, Arthur
Larlee, Hayden L.
Farrell, Daniel P.
Emack, Donald A
Kinney, Preston O.
Graney, Arthur W.
Flynn, George J.
Taylor, Frederick W.
Kemp, William J., Jr.
Marston, Osman C.
Gilman, Harry W.
Eaton, Frederick
Kearns, Robert F.
Geyer, Erich M.
Henderson, Wm. E.
Carroll, Raymond
Breyer, Warren S.
Pickering, Herbert E.
Herman, John
Cloutier, Romeo C.
Caswell, William F.

PLAINTIFF'S EXHIBIT NO. 10.

Portland Terminal Yard Brakeman Applicants who started striking period and did not complete or accept employment.

1942

Patrick E. Geary
Bertram J. D. Fairweather
Raymond O. Delcourt
Floyd A. Mann

1943

Hans R. Larsen
Stuart A. Vittum
James P. Collins
Henry P. Woodbury
Keith R. Carle
Harry J. Fox

1944

Robert D. Davis
Maurice L. Carter
John L. Tozie
Ludger Smart
Joseph A. Peterson
Howard L. Clark
Joseph W. Widor

1945

Marshall S Cram
Calvin F. Bickford
Robert B. Haney

[Title omitted.]

OPINION OF THE COURT
18th June, 1945.

PETERS, Judge: In this action the plaintiff seeks to have the defendant enjoined from violating the sections of the Fair Labor Standards Act relating to the payment of minimum wages and the keeping of records; Sections 15 (a)(2) and 15 (a)(5).

The defendant denies the applicability of the statute in the situation disclosed. The principal question raised involves the employment status of certain applicants for positions who are being trained by the defendant preparatory to regular employment as trainmen, in case they qualify. If, on the evidence, they should not be considered as employees, as the term is used in the Act, the plaintiff is not entitled to the injunctive relief asked for.

FINDINGS OF FACT

The defendant is a common carrier by railroad employing yard crews in the operation of its terminal facilities at Portland. Applicants for such positions have to be taught how to do the work. They are called "trainees" or "learners". If accepted as such, a trainee is turned over to a yard crew for practical instruction, which is given by affording an opportunity for observation of the routine activities and gradually permitting him to do the actual work under supervision. This is of no immediate advantage to the Railroad, however, as the trainee does not displace any member of the regular crew at the time. Rather,

it is a disadvantage, because a novice undertakes the work to get experience while a trainman stands by watching him, and the operation is apt to be impeded rather than expedited. If the trainee finishes training and is certified as fit for a position as trainman his name goes "on the board," as ready for work, and he receives an allowance of $4.00 a day for his training period based on an eight-hour day. If he does not finish training or is not certified as competent he receives nothing. Thus the Railroad obtains a pool of qualified workmen to draw upon and the worker is in line for a job.

Inexperienced applicants for employment are informed before entering upon the training period that they will receive the allowance only if they "stay and go to work." That is, if they complete the training period and are certified as qualified for employment.

The length of the training period, if completed, depends upon the aptitude of the learner for the work, the average being seven or eight days. When the applicant files his written application for employment he states "It is agreed by me to serve for at least two weeks under the instructions of a conductor for the purpose of learning the duties and qualifying for such position, employment to be subject of (sic) passing required examinations on the operating rules, the working rules and regulations as from time to time applied, and the approval of the designated officer."

The learners are not required to serve the whole two weeks if they can qualify sooner. As a matter of practice the period of training depends upon the capacity and aptitude of the individual trainee.

While training, the learner is expected to be present with the crew to which he has been assignd during working

hours, but he is not subject to the rules or discipline applicable to an employee and is not considered such.

Prior to October 1, 1943, the persons in training received no allowance, regardless of whether they were accepted for employment; serving without compensation for the purpose of learning the business.

On October 1, 1943, the defendant and the Brotherhood of Railroad Trainmen changed the previous custom by a letter directed to the Chairman of the Brotherhood of Railroad Trainmen reading as follows:

> "Effective October 1, 1943, and for the duration of the present Emergency, Student Brakemen, Road or Yard, will be made an allowance of $4.00 per day, for each calendar day, with a maximum number of ten days, irrespective of the hours devoted or the miles made on any day, the Student to devote not less than eight (8) hours each day to the service.
>
> Payment to be made if and when the Student has qualified, is accepted for and takes employment.
>
> If this arrangement meets with your approval, will you please so acknowledge on the second copy of this letter, which is attached."

There is no evidence as to what the practice regarding compensation will be at the end of the war. The defendant appears to be under no obligation by virtue of any agreement to continue it beyond that point.

Other than above mentioned the defendant does not pay learners the minimum wage provided by Sec. 6 of the Act nor does it maintain records of the kind required by Sec. 11(c) covering the trainees.

Conclusion of Law

For the purpose of decision it may be assumed that after the war defendant will revert to its former practice of pay-

ing trainees nothing for the training period and that it will continue as at present to pay nothing to those who do not complete the training.

On the issue presented the facts in the case do not differ in any material respect from those set forth in *Walling* v. *Jacksonville Terminal Co.*, 55 Fed. Supp. 302 (affirmed on appeal by the Circuit Court of Appeals in the Fifth Circuit April 23, 1945) and I follow that case and the reasoning of both courts in concluding that the trainee is not an employee under the commonly accepted meaning of the term nor as the term is used in the Act, it not being its purpose to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law.

I see no object in repeating or paraphrasing the reasoning in the above case, nor in *Walling, Adm., v. Nashville, Chattanooga and St. Louis Ry.*, recently (May 22, 1945) decided the same way by the district court in the middle district of Tennessee; but, finding no violation of law and no reason to apprehend any, I conclude that the bill should be dismissed. Judgment will be entered accordingly.

[Title omitted.]

JUDGMENT

June 20, 1945.

PETERS, J. In accordance with the opinion of the Court handed down June 18, 1945, it is

Ordered, that the Complaint in the above entitled case be dismissed.

JOHN A. PETERS,

Judge, U. S. District Court.

[Title omitted.]

NOTICE OF APPEAL

[Filed July 6, 1945.]

Notice is hereby given that L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, plaintiff in the above styled action, hereby appeals to the United States Circuit Court of Appeals for the First Circuit from the final judgment entered in this action on June 20, 1945.

Dated July 6, 1945.

(s) DOUGLAS B. MAGGS,
Solicitor,
(s) ARCHIBALD COX,
Associate Solicitor,
(s) GEORGE H. FOLEY,
Regional Attorney,
(s) GEORGE W. JANSEN,
Supervising Attorney,
Attorneys for L. METCALFE WALLING,
Administrator of the Wage and Hour Division, United States Department of Labor.

Post Office Address:
United States Department of Labor,
14th and Constitution Ave., N.W., Washington 25, D. C.
or
Old South Building, 294 Washington Street,
Boston 8, Massachusetts.

[Title omitted.]

STATEMENT OF POINTS

[Filed July 6, 1945.]

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, appellant in the above-entitled action, now designates the points on which he will rely in the prosecution of his appeal from the judgment entered in this action on June 20, 1945;

1. That the court erred in ruling that trainees for the jobs of brakemen at defendant's railroad terminal were not employees of the defendant within the meaning of the Fair Labor Standards Act of 1938 during the period when they were learning the duties and functions of the jobs.

2. That the court erred in denying the plaintiff an injunction as prayed in his complaint.

Dated July 6, 1945.

DOUGLAS B. MAGGS,
Solicitor,
ARCHIBALD COX,
Associate Solicitor,
GEORGE H. FOLEY,
Regional Attorney,
GEORGE W. JANSEN,
Supervising Attorney,
Attorneys for L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor.

Post Office Address:
United States Department of Labor,
14th and Constitution Ave., N.W., Washington 25, D. C.

or

Old South Building, 294 Washington Street,
Boston 8, Massachusetts.

I., George H. Foley, one of the attorneys of record for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, do hereby certify that on the 6th day of July, 1945, a copy of the foregoing statement of points was mailed to Leonard A. Pierce, Esquire, and Edward W. Atwood, Esquire, attorneys of record for Portland Terminal Company in Government franked envelopes to 465 Congress Street, Portland, Maine, the same being their last known address.

GEORGE H. FOLEY.

[Title omitted.]

DESIGNATION OF RECORD

[Filed July 6, 1945.]

To: The Clerk of the District Court of the United States for the District of Maine

In accordance with Rule 75(a) of the Federal Rules of Civil Procedure, you are requested to make a transcript of the record in the above styled action, pursuant to the notice of appeal filed therein, said transcript of record to contain the following:

1. Plaintiff's complaint.
2. Defendant's amended answer.
3. Complete transcript of the proceedings at the trial beginning on April 5, 1945, including all exhibits.
4. Opinion of the court of June 18, 1945.
5. Judgment dated and entered June 20, 1945.
6. Notice of appeal, with date of filing.

7. The statement of points.
8. This designation.

You are requested to prepare said transcript of record in accordance with Rule 75 of the Rules of Civil Procedure for the District Courts of the United States and to transmit the same to the Clerk of the United States Circuit Court of Appeals for the First Circuit within 40 days from the date of the notice of appeal, or within such extended period, not exceeding 90 days from said date as may be ordered by the District Judge.

Dated July 6, 1945.

(s) DOUGLAS B. MAGGS,
Solicitor,
(s) ARCHIBALD COX,
Associate Solicitor,
(s) GEORGE H. FOLEY,
Regional Attorney,
(s) GEORGE W. JANSEN,
Supervising Attorney,
Attorneys for L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor.

Post Office Address:
United States Department of Labor,
14th and Constitution Ave., N.W., Washington 25, D. C.
or
Old South Building, 294 Washington Street,
Boston 8, Massachusetts.

I, George H. Foley, one of the attorneys of record for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, do hereby

certify that on the 6th day of July, 1945, a copy of the foregoing designation of record was mailed to Leonard A. Pierce, Esquire, and Edward W. Atwood, Esquire, attorneys of record for Portland Terminal Company in Government franked envelopes to 465 Congress Street, Portland, Maine, the same being their last known address.

GEORGE H. FOLEY.

[Title omitted.]

STIPULATION

[Filed August 15, 1945.]

It is stipulated in the above entitled cause as follows:

Plaintiff's original exhibits 1 and 2 and defendant's original Exhibit A need not be made a part of the printed record on appeal, defendant's original Exhibit A need not be sent to the United States Circuit Court of Appeals for the First Circuit, and appellant's designation of the record on appeal may be considered as amended accordingly.

WILLIAM S. TYSON,
Acting Solicitor,
JETER S. RAY,
Assistant Solicitor,
GEORGE H. FOLEY,
Regional Attorney,
GEORGE W. JANSEN,
Supervising Attorney,
HARRY A. TUELL,
Attorney,
U. S. Department of Labor,
Attorneys for Appellant.
E. SPENCER MILLER,
Attorney for Appellee.

[Title omitted.]

MOTION AS TO ORIGINAL PAPERS AND EXHIBITS

[Filed August 15, 1945.]

Now comes the appellant in the above entitled cause and moves that plaintiff's original exhibits 1 and 2 which were introduced in evidence at the trial of said cause be sent to the United States Circuit Court of Appeals for the First Circuit in lieu of a copy thereof upon such terms as this Court may by its Order prescribe.

WILLIAM S. TYSON,
Acting Solicitor,
JETER S. RAY,
Assistant Solicitor,
GEORGE H. FOLEY,
Regional Attorney,
GEORGE W. JANSEN,
Supervising Attorney,
HARRY A. TUELL,
Attorney,
U. S. Department of Labor,
Attorneys for Appellant.

[Title omitted.]

ORDER AS TO ORIGINAL PAPERS AND EXHIBITS

[Filed August 15, 1945.]

This cause came on this day to be heard on the motion of appellant that certain of the original exhibits introduced in evidence at the trial of this cause be sent to the United States Circuit Court of Appeals for the First Circuit in lieu of a copy thereof, and it appearing to the court that such exhibits are not readily susceptible to be made a part of the printed record;

It is ordered that plaintiff's original exhibits 1 and 2 need not be copied in the printed record of the testimony of the witnesses given at the trial of this cause but that the same shall be preserved by the Clerk of this Court until after the filing of briefs by appellant and appellee in the United States Circuit Court of Appeals for the First Circuit, at which time said original exhibits shall be forwarded to the Clerk of the United States Circuit Court of Appeals for the First Circuit, subject to its further orders in regard thereto. Pending the forwarding of said original exhibits to the United States Cicuit Court of Appeals for the First Circuit, they may be inspected and copied by the attorneys for appellant and appellee in whatever respects deemed material by them.

JOHN A. PETERS,
Judge, U. S. District Court.

Appellee assents hereto, 15 Aug. 1945.

E. SPENCER MILLER,
Attorney for Appellee.

[MEMORANDUM: A motion for an extension of time for filing record on appeal and an order extending time to August 15, 1945, are here omitted. A. I. CHARRON, *Clerk.*]

CLERK'S CERTIFICATE

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

I, Eben Winthrop Freeman, Clerk of the aforesaid Court, hereby certify that the foregoing is a true copy of the matter designated by the parties as constituting the record on appeal in the case entitled,

No. 230, Civil.

L. METCALFE WALLING,
Administrator of the Wage and Hour Division,
United States Department of Labor,
PLAINTIFF, APPELLANT,

vs.

PORTLAND TERMINAL COMPANY,
DEFENDANT, APPELLEE,

in said District Court determined.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court at Portland in said District, this twenty-first day of August, A.D. 1945.

[SEAL] EBEN WINTHROP FREEMAN,
Clerk.

PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On March 5, 1946, this cause came on to be heard, and was fully heard by the court, Honorable Calvert Magruder, Honorable John C. Mahoney and Honorable Peter Woodbury, Circuit Judges, sitting.

Thereafter, to wit, on April 29, 1946, the following opinion of the court and dissenting opinion were filed:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 4111. October Term, 1945

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR, PLAINTIFF, APPELLANT

v.

PORTLAND TERMINAL COMPANY, DEFENDANT, APPELLEE

Appeal from the District Court of the United States for the District of Maine

Before MAGRUDER, MAHONEY, and WOODBURY, JJ.

William S. Tyson, Acting Solicitor, Jeter S. Ray, Assistant Solicitor, George H. Foley, Regional Attorney, George W. Jansen, Supervising Attorney, Harry A. Tuell, Senior Attorney, Morton Liftin, Attorney, U. S. Department of Labor for Appellant.

E. Spencer Miller, for Appellee.

Opinion of the Court

April 29, 1946

MAHONEY, J. The district court denied an injunction sought by the Administrator of the Wage and Hour Division of the United States Department of Labor against the defendant for alleged violations of §§ 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act and from that decision the Administrator has appealed. This case calls upon us to determine whether persons who are engaged in training for positions with the defendant company as yard brakemen are "employed" by the company or are "employees" of the company during the training period within the meaning of § 3 (e) and (g) of said Act. If these so-

called "trainees" or "learners" are "employees" then the defendant must pay them the minimum wages and keep the records required by §§ 6 (a) and 11 (c) of the Act.

Because of the disposition we make of the case, it is unnecessary for us to consider whether these trainees are engaged in interstate commerce.

The defendant operates a railroad terminal at Portland, Maine, and employs yard crews in the operation of its facilities. For some years it has been the custom of the defendant and other railroad companies to require all inexperienced applicants for jobs as yard brakemen to go through a training period. Prospective workers are required to file a formal application for employment, to take an eye test and undergo, at their own expense, a physical examination by a physician designated by the company. If the applicant passes these examinations he is assigned to a conductor who is in charge of a yard crew of three regular men and he goes through a training period. The trainees are given an opportunity to observe the type of work they will do when and if they become regular brakemen. Under supervision of regular crew members they are gradually permitted to do more and more of the work which the regulars do until such time as the conductor deems them competent to serve without supervision. If a trainee finishes his training period and is certified by the conductor as competent to carry out the duties of a brakeman, his name is placed "on the board", which means that he is eligible for employment as a regular. Before October 1, 1943, the trainees were not paid during the training period. Since then the company has paid each trainee $4.00 a day for each eight hour day of that period if he finishes his training and is placed "on the board".[1] If he does not complete his training period or is not certified as competent, he receives nothing for the time he has put in. The trainees are informed of these provisions in regard to compensation before they are permitted to start their training. The length of the training period required depends upon the aptitude and skill exhibited by the individual trainee and averages about seven or eight days.

[1] On October 1, 1943, the defendant wrote to the Chairman of Brotherhood of Railroad Trainmen, in conformity with an agreement between it and the Brotherhood. This letter follows:

"Our talk of September 28th—

"Effective October 1, 1943, and for the duration of the present Emergency, Student Brakemen, Road or Yard, will be made an allowance of $4.00 per day, for each calendar day, with a maximum number of ten days irrespective of the hours devoted or the miles made on any day, the Student to devote not less than eight (8) hours each day to the service.

Payment to be made if and when the Student has qualified, is accepted for and takes employment.

If this arrangement meets with your approval, will you please so acknowledge on the second copy of this letter, which is attached."

Soon after this agreement, The Company advertised in newspapers for the services of trainees on these terms.

There is no evidence that this practice will be continued beyond the "present Emergency". It does not appear that the defendant is under any contractual obligation to continue it.

The maximum length of the period is two weeks. The application for employment which is signed by the prospective trainee states: "It is agreed by me to serve for at least two weeks under instructions of a conductor for the purpose of learning the duties and qualifying for such position, employment to be subject of (sic) passing required examinations on the operating rules, the working rules and regulations as from time to time applied, and the approval of the designated officer." During the period of training, the trainee is expected to be present with the crew to which he has been assigned during the working hours, which are normally eight hours a day, but are sometimes longer. As a matter of practice, the trainee is not required to pass any examination on the rules of the company, though he is required to copy those rules into a notebook.

The court below found that the work of the trainee "is of no immediate advantage to the Railroad * * * as the trainee does not displace any member of the regular crew at the time. Rather, it is a disadvantage, because a novice undertakes the work to get experience while a trainman stands by watching him, and the operation is apt to be impeded rather than expedited." It found, however, that the training program enables the railroad to obtain "a pool of qualified workmen to draw upon * * *". It also found that the trainee "is not subject to the rules or discipline applicable to an employee and is not considered such".

The finding of the district court that the defendant does not pay the trainees the minimum wage required by § 6 of the Act aside from the $4.00 allowance and does not maintain the records required by § 11 (c) is not in dispute. Thus the sole question presented to us is whether the trainees here under consideration are "employees" within the meaning of the Act, for if they are, the injunction sought by the Administrator should have been granted.

Section 3 (d) of the Act defines the word "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee * * *". Section 3 (e) defines an employee as "any individual employed by an employer" and Section 3 (g) tells us that " 'Employ' includes to suffer or permit to work". Under these definitions, an employee is any individual whom an employer suffers or permits to work. If these definitions were the sole criteria for determination, then it would seem that these trainees are employees, for they are certainly permitted to work on the premises of the Portland Terminal Company under any common definition of the word work. But did Congress intend to include in the classification of employees all persons whom an employer suffers or permits to work? Did Congress intend to compel an employer to pay the minimum wage required by the Act to a person who voluntarily and purely for

his own benefit seeks to labor under an employer's control? Suppose an author desired to work in the train yards in preparation for writing a novel and requested the Portland Terminal Company to give him an opportunity to do so. Would the Terminal Company be obligated to pay him the minimum wage, when the author neither sought nor expected pay? It hardly seems that Congress intended the Act to cover such an individual. And yet a literal construction of the definitions in the Act would compel the Company to pay the author the minimum wage, for if he pulled any pins or threw any switches or coupled any cars, he would be working and the company would be permitting him to work.

A number of cases have arisen where an employee (or an independent contractor) hires an individual to work on the premises or with the property of his employer with the knowledge of the latter. At least three Circuit Courts of Appeals have held that the sub-employee was not an employee of the primary employer within the meaning of the Act even though that employer suffered or permitted him to work. Walling v. Sanders, 136 F. (2d) 78 (C. C. A. 6th, 1943); Helena Glendale Ferry Co. v. Walling, 132 F. (2d) 616 (C. C. A. 8th, 1942); Bowman v. Pace Co., 119 F. (2d) 858 (C. C. A. 5th, 1941).

There is no question but what this statute should be liberally construed for it is remedial and humanitarian legislation. Fleming v. Palmer, 123 F. (2d) 749, 762 (C. C. A. 1st, 1941) cert. den. 316 U. S. 662. And the definition of employees is certainly a very comprehensive definition. United States v. Rosenwasser, 323 U. S. 360, 362 (1945). But we do not believe that Congress intended to give to the term "employee" the expansive scope that a literal construction of the words "suffer or permit to work" would compel. We cannot infer that Congress intended the absurdities that such a construction would breed.

In deciding that the trainees were not "employees" the district court followed the conclusion and reasoning of Walling v. Jacksonville Terminal Co., 148 F. (2d) 768 (C. C. A. 5th, 1945) which we have found to be the only appellate court decision similar in factual situation to the case at bar. That case involved trainees for engine and switching service with the Jacksonville Terminal Company. The nature of the training program of that company was similar to the program of the Portland Terminal Company. However, as stated in that case, "A trainee (for the Jacksonville Co.) has no regular time to report or hours for training, though generally he joins a crew at the beginning of their shift and exhibits his permit to receive instruction. He is free to select such time each day as best suits his convenience, and he frequently appears after completing his day's work elsewhere". The trainee for the Jacksonville Company was required to study rules and

regulations and pass an examination thereon before he could be put on as a regular employee. And the trainee for that Company was not entitled to any compensation even though he successfully completed his training and was assigned to a regular job. The court there found that "the company did suffer the trainee to work on its premises and with its appliances" but because "the benefit immediately in view was to the trainee, that he might learn, might qualify himself for a job which he desired", it held that he was not employed by the Terminal Company within the meaning of the Act. The fundamental reasoning of the court stemmed from its decision in Bowman v. Pace, supra, where it said: "It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly, nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act." We do not mean to indorse this test as the sole criterion for determining whether the relationship of employment exists. But we do feel that it is at least one very important element to be taken into consideration.

The fact that the defendant in the instant case made a contingent promise to pay the trainees $4.00 a day and advertised in newspapers perhaps makes this case a stronger one for the government. In the Jacksonville Terminal case the court commented that "If such employees should be in demand, so that the Company were seeking trainees instead of trainees seeking permits to train, a different arrangement might result under which training with pay might be agreed on. Apparently that is not now the case; certainly that is not the present basis of the training." We do not believe that the possibility of payment for the work which exists in the case before us is determinative. The promise was contingent. There was no absolute assurance that the trainee would receive payment for his work nor was he absolutely entitled to wages. All that is indicated by the promise to pay and the advertisement requesting trainees is that the company had a more immediate need for trainees than previously in order to maintain a pool of qualified workers. They do not indicate that the services of the trainee were primarily or necessarily beneficial to the company. Hence we feel that the principles set forth in the Jacksonville Terminal Co. case are applicable here. Even an absolute promise to pay the trainees a specific sum per day regardless of whether they completed the training period and were found competent was not considered sufficient to make the trainees "employees". Walling v. Nashville, Chattanooga & St. Louis Ry., 60 F. Supp. 1004 (M. D. Tenn. 1945).

In Jewell Ridge Coal Corp. v. Local No. 6167, 325 U. S. 161, 163–166 (1945) and Tennessee Coal, Iron & R. R. Co. v. Muscoda Local No. 123, 321 U. S. 590, 598 (1944) the Supreme Court set for the essential elements of work as (1) physical or mental exertion (whether burdensome or not); (2) controlled or required by the employer; and (3) pursued necessarily and primarily for the benefit of the employer and his business. In those cases, the court held that miners while traveling from the mine portals to their station of work in the mines and back were working within the meaning of the Act so as to be entitled to the minimum wages for the time spent in so traveling.

At least one of the three requirements set forth by the Supreme Court is not satisfied in the instant case. Of course, the trainees underwent physical and mental exertion and it may be that this exertion was "controlled or required" by the defendant, but we do not believe that it was "pursued necessarily and primarily for the benefit" of the defendant. In the case of many trainees, the company received no benefit whatsoever for they terminated their relationship before coupleting the training period. As to those employees the training period was certainly a burden to the company. The company has no guarantee that a trainee will complete his training and ultimately accept employment if it is offered to him. There can be no question, however, but what the company did receive some benefit from the existence of its training program. Without such a program, it would not be long before the company would find itself lacking capable operatives. But the test set forth is not one of the benefit to the company. The test is whether the work necessarily or primarily benefits the company. We cannot conclude that the company and not the trainee received the principal benefit of the training program or that the work of a trainee would inevitably benefit the company.

The Administrator urges that § 14 of the Act[2] assumes that learners are "employees". That section gave the administrator discretionary power to "provide for (1) the *employment* of learners * * *" at wages lower than the minimum wage provided for in Section 6. (Italics supplied.) The very wording of Section 14, however, presupposes employment. If a learner is not "employed" within the meaning of the Act, then the Administrator has no authority to make regulations in regard to him. And we

[2] Sec. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

have already concluded that these learners are not employed. This interpretation of Section 14 is the same as that rendered in the Jacksonville Terminal Co. case and The Nashville, Chattanooga & St. Louis Railway case.

The judgment of the District Court is affirmed.

MAGRUDER, J. (dissenting). These "trainees" are required to report for duty at specied hours, and remain on the job during the entire working shift of the regular crew, subject to all the hazards of the employment. They are engaged in mental and physical exertion under the direction and control of a supervisory employee and are gradually broken in to the actual performance of the various routine tasks of yard brakemen. It does not seem to me to be important that the trainees are ordinarily extra men on crews. See Brown v. Chicago, R. I. & P. Ry. Co., 315 Mo. 409, 286 S. W. 45 (1926), where a "student fireman" serving on a locomotive along with a full engine crew was held to be an employee within the meaning of the Federal Employers Liability Act. See also Rief v. Great Northern Ry. Co., 126 Minn. 430, 148 N. W. 309 (1914). In view of the recognition in the opinion of the court that the trainees here involved "are certainly permitted to work on the premises of the Portland Terminal Company under any common definition of the word work", I think we are obliged by the comprehensive statutory definitions to hold the trainees to be employees within the meaning of the Fair Labor Standards Act. Cf. Tennessee Coal, Iron & R. R. Co. v. Muscoda Local, 321 U. S. 590 (1944); National Labor Relations Board v. Hearst, 322 U. S. 111 (1944). Walling v. Sanders, 136 F. (2d) 78 (C. C. A. 6th, 1943), and similar cases, are not controlling, for there the men involved were admittedly employees, and the only question was, who was their employer? Here, if the trainees are employees, Portland Terminal Company is without doubt their employer. If the Terminal Company had followed the practice of putting approved applicants on the payroll immediately as yard brakemen, but had assigned them for the first week or two as extra men accompanying the regular crews to familiarize themselves with the layout of the yard and gradually to undertake performance of the routine tasks under supervision, such new men, I suppose without any question, would be deemed to be employees. Calling them "trainees", instead of yard brakemen on trial or probationary employment, could hardly work a change in their status.

It is of no consequence that during their early training period the trainees may be of little immediate benefit—indeed, may be a "disadvantage"—to the company. This may often be the case with learners or beginners. For instance, inexperienced operators of looms in a textile mill may spoil goods, get the machines out

of order, have a low production rate, may be in fact an economic liability to the employer, until skill and facility are acquired. Nonetheless, for better or for worse, they are employees. This was well known to Congress when it enacted the Fair Labor Standards Act. It recognized that in certain employments it might be appropriate to allow the hiring of learners, or "trainees", at less than the generally applicable minimum wage rates. But instead of granting to the employer an outright exemption from the wage provisions of the Act during a specified training period (as was proposed, 83 Cong. Rec. 7389, 7391, 7393), Congress required the payment of the statutory minimum wage to all employees, including learners, unless and until the employer, under regulations to be prescribed by the Wage and Hour Administrator, should obtain a special certificate authorizing the employment of learners at stated wage rates less than the statutory minimum and under such other conditions as the Administrator might prescribe. I think the court's decision in the case at bar constitutes a serious impairment of the administrative safeguards contained in Section 14 of the Act.

On the same day, to wit, April 29, 1946, the following judgment was entered:

Judgment

April 29, 1946

This cause came on to be heard March 5, 1946, upon the transcript of record of the District Court of the United States for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now, to wit, April 29, 1946, here ordered, adjudged, and decreed as follows: The judgment of the District Court is affirmed.

By the Court.

(S) ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on May 15, 1946, mandate issued.

Clerk's certificate

I, Roger A. Stinchfield, Chief Deputy Clerk of the United States Circuit Court of Appeals for the First Circuit, and, during the temporary absence of the clerk, in charge of the affairs of the clerk's office of said court and custodian of its files and records, certify that the foregoing pages numbered 1 to 145, inclusive, contain and are a true copy of the record and all proceedings to, and including, July 13, 1946, in the cause in said court numbered and entitled, No. 4111, L. Metcalfe Walling, Administrator of the

Wage and Hour Division, U. S. Department of Labor, Plaintiff-Appellant v. Portland Terminal Company, Defendant-Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Circuit Court of Appeals for the First Circuit, at Boston, Massachusetts, in said First Circuit, this thirteenth day of July, A. D. 1946.

[SEAL] (S) ROGER A. STINCHFIELD,
Chief Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1946

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE, 1946